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Supreme Court, U.S.
FILED

No. _____ 06-723 NOV 21 2006

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In The

Supreme Court of the United States

KELLI BARRETT FITCH,

Petitioner,

vs.

NORMAN D. MORROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Fifth Circuit's "break in causation" doctrine is inconsistent with the element of causation enacted by Congress under the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U.S.C. § 1983, as interpreted by this Court in *Malley v. Briggs*, 475 U.S. 335, 344 n. 7 (1986)?

Whether it is the clarity of existing law governing an alleged constitutional violation, not the clarity of statutory law that would permit liability for the constitutional violation, that is the relevant inquiry when the availability of qualified immunity is determined under the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

No parties other than those listed in the caption (Petitioner Kelli Barrett Fitch, and Respondent Norman D. Morrow), were parties to the proceeding in the court whose judgment is sought to be reviewed.

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The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought, *Fitch v. Morrow*, No. 05-20667 (Aug. 30, 2006), is unpublished, but is reprinted as Appendix A (App. A1-A9). The Judgment and Memorandum Opinion of the United States District Court for the Southern District of Texas, Houston Division, which granted Respondent's motion for summary judgment (Aug. 1, 2005), is unpublished, but is reprinted in Appendix B (App. B1-B25). The Order and Memorandum Opinion of the United States District Court for the Southern District of Texas, Houston Division, which denied Respondent's motion to dismiss (Sept. 8, 2004), is unpublished, but is also reprinted in Appendix B (App. B26-B45).

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit from which review is sought was entered on August 30, 2006, and in accordance with Rule 13.1, this Petition has been timely filed. Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U.S.C. § 1983, provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . . "

STATEMENT OF THE CASE

A) Proceedings Below

The Petitioner originally brought this action pursuant to the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U.S.C. § 1983 (hereinafter "§ 1983") in a State District Court in Harris County, Texas, on April 19, 2002. Following the removal of Petitioner's case to the United States District Court for the Southern District of Texas by Respondent Morrow (hereinafter "Morrow") on May 19, 2003, Petitioner filed her Third Amended Complaint. On September 8, 2004, the District Court denied Morrow's motion to dismiss, ruling that Petitioner in her Third Amended Complaint had "plainly stated a § 1983 claim for violation of her Fourth Amendment rights."[1] On August 1, 2005, the District Court in a memorandum opinion and final judgment granted Morrow's motion for summary judgment. The basis for the District Court's decision was that, assuming *arguendo* that Petitioner's Fourth Amendment rights had been violated by an invalid arrest warrant for which Morrow had applied,[2] Morrow was entitled to "qualified immunity" under the Fifth Circuit's "break in

[1] App. B42-B43.

[2] App. B16.

causation" doctrine because Petitioner had failed to show, as required under an exception to that doctrine, that Morrow acted with "malicious intent,"[3] or that he "knowingly and recklessly misconstrued or withheld . . . relevant information,"[4] when applying for the arrest warrant.

Petitioner timely filed her Notice of Appeal in the United States Court of Appeals for the Fifth Circuit on August 5, 2005; and on August 30, 2006, the Court of Appeals affirmed the District Court's decision in an unpublished opinion.[5] The basis for the Fifth Circuit's decision was that, notwithstanding this Court's express disapproval of the Fifth Circuit's "break in causation" doctrine in *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986), that doctrine remains "firmly ensconced" in Fifth Circuit precedent,[6] and Morrow was therefore entitled to qualified immunity as the result of the Fifth Circuit's prior statutory interpretation of the element of causation under § 1983, regardless of whether it would have been clearly apparent to an objectively reasonable police officer that a Fourth Amendment violation was likely to result from his actions.[7]

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[3] App. B22.

[4] App. B15-B17; App. B23-B24.

[5] App. A1.

[6] App. A6-A7.

[7] In reliance on undisputed evidence in the record indicating that Morrow's conduct was "objectively unreasonable," Petitioner did not contest in either the District Court or on appeal whether a genuine issue of fact existed with respect to Morrow's "malicious intent." *See*, App. A5 n.2.

B) Statement of Facts

The material facts involved in this case are that Morrow, when using a computer data base that contained identifying information on persons known to reside within Harris County, Texas, arbitrarily substituted Petitioner's maiden name ("Kelli Renee Barrett") in his application for an arrest warrant when he had no reason to believe that Petitioner was, and had substantial reason to believe Petitioner was not, another person named "Kelly Barrett."[8] The person who had allegedly committed the offense of burglary of a building, and for whom probable cause may have existed, was specifically identified by name ("Kelly Barrett") in a written report which Morrow had examined prior to applying for the warrant.[9] As observed by the District Court in its memorandum opinion, the facts herein are largely undisputed.[10]

In her Third Amended Complaint, Petitioner alleged that the warrant which resulted in her arrest was invalid when issued due to its failure to particularly describe the person for whom probable cause existed, as required by the Particularity Clause of Fourth Amendment to the United States Constitution. In this connection, Petitioner alleged that the warrant in question failed to particularly describe the intended target of the criminal investigation,

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[8] According to the United States Census Bureau decennial report for the year 2000, Harris County, Texas, had an enumerated population of 3,400,578.

[9] App. B2-B7.

[10] App. B2 n.2 ("The Court agrees with [Petitioner] that 'to a large extent the facts alleged by [Petitioner] are undisputed by [Respondent] Morrow.").

and more specifically, that the arrest warrant in question was invalid when issued for the reasons that:

1) Morrow either "knew *or should have known*" that he was identifying in his warrant application a person other than "Kelly Barrett";

2) Morrow's actions breached his constitutional "duty to discover" that his speculation and factually unsupported assumption (that "Kelli Renee Barrett" and "Kelly Barrett" were one and the same person) was incorrect;

3) Morrow's arbitrary selection of Petitioner "Kelli Renee Barrett" as the intended target of an arrest warrant, when he was (or should have been) uncertain of the "true name" of his intended target, was objectively unreasonable in light of the information that he possessed, or which was reasonably available to him;

4) Morrow failed to "discover and disclose" to the issuing Magistrate some reasonably available modicum of information suggesting that "Kelli Renee Barrett" and "Kelly Barrett" were one and the same person; and

5) Morrow's actions under the circumstances he confronted were "objectively unreasonable" and not merely the factual "mistake" of a "reasonable man."[11]

[11] *Plaintiff's Third Amended Complaint* (Rec. 376-375).

Morrow in his motion for summary judgment successfully contended that his alleged subjective "good faith," both independently and in combination with the Magistrate's decision to issue the warrant for Petitioner's arrest, "broke the causal chain" and "insulated" him from liability under § 1983.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's "Break In Causation" Doctrine Directly Conflicts With This Court's Interpretation of Causation Under 42 U.S.C. § 1983.

The Fifth Circuit's "break in causation" doctrine, which continues to allow violators of the Fourth Amendment to escape liability under § 1983, has its origin in *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) ("if the facts supporting an arrest are put before an intermediate such as a magistrate . . . the intermediate's decision breaks the causal chain and insulates an initiating party."). It was the Fifth Circuit's "breaks causal the chain" doctrine upon which the District Court of Rhode Island relied in *Briggs v. Malley* when it denied the plaintiffs in that case the constitutional protection they were guaranteed by the Fourth Amendment and the relief to which they were legally entitled under § 1983. *See Briggs v. Malley*, 748 F.2d 715, 717 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986). On appeal from the Rhode Island District Court's judgment, the United States Court of Appeals for the First Circuit (*citing Rodriguez v. Ritchey*) expressly rejected the Fifth Circuit's "breaks the causal chain" doctrine. *Id.*, 748 F.2d at 720-721 ("we believe the foregoing [analysis] disposes of the Fifth Circuit's 'chain of causation' approach"). Although Petitioner Malley did not

again "press" the Fifth Circuit's "break in causation" defense before this Court in *Malley v. Briggs*, 475 U.S. 335 (1986), this Court nonetheless found it necessary (and troubling enough)[12] to flatly reject the Fifth Circuit's "no-causation" rationale with this unambiguous statement:

> "Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983. As we stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link."

Id., 475 U.S. at 344 n.7.

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[12] Two Terms prior to *Malley v. Briggs*, supra, the author of the Supreme Court's decision in *Malley*, Justice White, dissented from the denial of certiorari in *Smith v. Gonzales*, 459 U.S. 1005 (1982). In that dissent, Justice White alluded to the "three contrasting options" available to resolve "the causation problem" created by *Rodriguez v. Ritchey*, supra, including the approach advocated by Judge Goldberg in dissent (joined by five of his Brethren in the Fifth Circuit), wherein liability would attach if an officer's decisions when procuring an Indictment or arrest warrant were "not within the bounds of reason." *Id.*, 459 U.S. at 1006-1007.

The Fifth Circuit has relegated this Court's "interpretation of § 1983" to "dicta."[13] It is indeed "clear" (at least to the Petitioner herein and virtually all others) that the Fifth Circuit's continuing adherence to its "break in causation" doctrine evinces nothing less than a conscious decision to defy the "clear" import of this Court's prior "interpretation" of causation under § 1983, as described above. As a result of the Fifth Circuit's intransigence the "break in causation" doctrine continues to operate in the Fifth Circuit in a manner that egregiously undermines the remedy enacted by Congress in § 1983. The Fifth Circuit's apparent defiance of this Court's "interpretation of § 1983" serves as nothing less than an effective means to permit police officers to wholly escape liability for objectively unreasonable conduct causing violation of the Fourth Amendment.[14]

The "break in causation" doctrine is a judicially created device of the Fifth Circuit that is utterly without foundation in law. Section 1983 does not contain any "state of mind" requirement independent of the constitutional (or statutory) provision allegedly violated.[15] Nor does the

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[13] *Murray v. Earle*, 405 F.3d 278, 291 n.44 (5th Cir. 2005), and accompanying text; and *id.*, at 292 ("we are unwilling to disregard firmly ensconsed circuit precedent in favor of such a cursory analysis of *Malley*'s dicta.").

[14] With little enduring effect, one panel of the Fifth Circuit in *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1308 (5th Cir. 1987) (opinion per Rubin, J.) did note the obvious and inescapable tension between the Supreme Court's decision in *Malley v. Briggs*, and the Fifth Circuit's pre-existing "break in causation" doctrine.

[15] *See Parratt v. Taylor*, 451 U.S. 527, 534 (1981) ("Section 1983, unlike its criminal counterpart . . . has never been found by this court to contain a state-of-mind requirement"); *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (Section 1983 "contains no state of mind requirement independent of that necessary to state a violation of the underlying constitutional right."); *Farmer v. Britton*, 511 U.S. 825, 841 (1994) (same); *Bryan County v. Brown*, 520 U.S. 397, 405 (1997) (same).

Fourth Amendment involve any inquiry into whether a police officer has acted with subjective "intent" or "malice" when causing a constitutional violation.[16]

Legal treatises published at the time § 1983 was enacted (1871) also disabuse any notion that the actions of a Magistrate constitute an "intervening cause" between an application for an arrest warrant and a subsequent arrest. As illustrated by *Wyatt v. Cole*, 504 U.S. 158 (1992), the Court has often resorted to vintage legal treatises to exemplify common law tort principles at the time § 1983 was enacted. *See id.*, 504 U.S. at 164, *citing* C. Addison, *Law of Torts* (1876) (hereinafter "*Addison*"); T. Cooley, *Law of Torts* (1879) (hereinafter "*Cooley*"); and J. Bishop, *Commentaries on Non-Contract Law* (1889) (hereinafter "*Bishop*").[17] In *Addison*, the concepts of "causation" and "intervening cause" are described as follows:

> "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and damage are not sufficiently conjoined or concatenated as cause and effect to support an action. . . .

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[16] *Graham v. Connor*, 490 U.S. 386, 398 (1989) (noting that while other constitutional provisions, such as the Eighth Amendment by its inclusion of the terms "cruel" and "punishment," may "suggest some inquiry into subjective state of mind, . . . the term 'unreasonable' [in the Fourth Amendment] does not."); *Whren v. United States*, 517 U.S. 806, 813 (1996) (noting that the subjective "intentions" of a police officer simply "play no role" in Fourth Amendment analysis).

[17] *See also Malley v. Briggs*, supra, 475 U.S. at 341 n.3, *citing* 4 W. Wait, *Actions and Defenses*, 352-356 (1878).

> "If the wrong would not have been followed by the damage, if other circumstances had not intervened, for which circumstances the defendant is not responsible, the damage is not the proximate result of the wrong, and is not sufficiently concatenated therewith . . .
>
> "The general rule of law, however, is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer, or provided their acts, causing damage, were the necessary or legal and natural consequences of the original wrongful act."[18]

Judge Cooley, after restating the first of the foregoing three principles *verbatim*,[19] described the rule applicable to an "intervening cause" as follows:

> "If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent. But if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last

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[18] 1 *Addison*, supra, Ch. 1, §§ 10-12, at 12-13.

[19] *Cooley*, supra, at 69.

> wrong as the proximate cause, and not to that which was more remote."[20]

In *Bishop*, the general rule of causation involving more than one cause is stated as follows:

> "When [an] injury proceeds from two causes operating together, the party putting in motion one of them is liable the same as though it was the sole cause. This is the one form of a universal principle in the law, that he who contributes to a wrong, either civil or criminal, is answerable to the doer. And it is immaterial to this proposition whether that to which he contributes is the volition of a responsible person, or an irresponsible one, or whether it is a mere inanimate force, or a force in nature, or a disease."[21]

Addressing the rule applicable to an "intervening" cause, *Bishop* states further that:

> "If, after the cause in question has been in operation, some independent force comes in and produces an injury not its natural and probable effect, the author of the cause is not responsible."[22]

Specifically with regard to a civil defendant's "attend[ance] before a magistrate," such as when a defendant is alleged to have "induced the magistrate to issue a warrant against the plaintiff," the defendant's subjective "good faith" defense was defeated at common law in 1871

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[20] *Id.*, 70-71.

[21] *Bishop*, supra, § 39, at 15.

[22] *Id.*, § 42, at 17.

if the facts stated by the defendant to the issuing magistrate "were of such a nature that no well-intentioned person would state them, and found a criminal charge upon them, without ascertaining whether they were true or false, the means of inquiry and of ascertaining the truth being within his reach, if he had thought to avail himself of them."[23] Under these circumstances, "it d[id] not lie in [a defendant's] mouth to say that the magistrate ought not to have granted the warrant."[24]

The literal terms of § 1983 plainly disclose that "Congress ... specifically provide[d] that A's tort bec[o]me[s] B's liability if B 'cause[s]' A to subject another to a tort." *Monell v. New York Department of Social Services*, 436 U.S. 658, 692 (1978); *accord Jett v. Dallas Independent School District*, 491 U.S. 701, 751 (1989). In its decisions interpreting § 1983, the Court has adhered with fidelity to the common law definition of "causation" extant at the time § 1983 was first enacted. For example, the Court has stated that "causation" under § 1983 is established by evidence that a person has "set the wheels of government in motion." *Wyatt v. Cole*, supra, 504 U.S. at 164, *citing Malley v. Briggs*, 475 U.S. at 340-341 (1986). Conversely, the Court has made clear that "but for" causation (sometimes called "causation in fact"), while perhaps a necessary predicate to liability, will not alone provide a sufficient condition for liability under Section 1983. *See Martinez v. California*, 444 U.S. 277, 285 (1980) (holding that a "decedent's death [was] too remote a consequence"

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[23] 2 *Addison*, supra, § 856, at 74-75.

[24] *Ibid.*

of official action). *See also Oklahoma City v. Tuttle*, 471 U.S. 808, 833 n.9 (1985) (Brennan, J., concurring).

Simply stated, a police officer's subjective "state of mind" simply is not a component *of any element* of a plaintiff's compensatory claim under § 1983, including causation, when the substantive right violated is protected by the Fourth Amendment. This conclusion is reinforced by an additional passage in the Supreme Court's decision in *Malley*, wherein the Court ruled that its decision was intended to permit "a damages remedy for an arrest following an *objectively unreasonable* request for a warrant . . . [that would] benefi[t] the victim of police misconduct one would think most deserving of a remedy – the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason." *Id.*, 475 U.S. at 344 (italics added).

Now that more than twenty years have elapsed since the Court expressly disapproved the Fifth Circuit's "breaks the causal chain" doctrine in *Malley v. Briggs*, supra, the stark, significant and recurring question presented by the instant case is simply this: Just how much longer will the United States Court of Appeals for the Fifth Circuit, and other federal district courts bound by Fifth Circuit precedent, continue to openly ignore (if not consciously defy) this Court's express disapproval of the "break in causation" doctrine? Without this Court's intervention, it is now abundantly clear that the answer to that question is "forever."

II. There is a Direct Conflict Between the Decisional Law of Fifth Circuit and the United States Courts of Appeals For The First, Second, and Fourth Circuits Over Whether The "Break In Causation" Doctrine Applies In § 1983 Cases.

In addition to the First Circuit's rejection of the Fifth Circuit's "break in causation" doctrine in *Briggs v. Malley*, 748 F.2d 715, 720-721 (1984), *aff'd*, 475 U.S. 335 (1986), as discussed above, the United States Court of Appeals for the Second and Fourth Circuits have also parted company with the Fifth Circuit. In *Zahrey v. Coffey*, 221 F.3d 342 (2nd Cir. 2000), after an extended examination of inter-circuit authorities that have addressed "intervening causes" under § 1983, *id.*, 221 F.3d at 351-352, the Second Circuit disapproved the Fifth Circuit's "break in causation" doctrine, noting that "[e]ven if the intervening decision-maker (such as a prosecutor, grand jury, or judge) is not misled or coerced, it is not readily apparent why the chain of causation should be considered broken where the initial wrongdoer can reasonably foresee that his conduct will contribute to an 'independent' decision that results in a deprivation of liberty." *Id.*, 221 F.3d at 352. Likewise, the Fourth Circuit has ruled that a "judicial determination of probable cause does not 'break the causal chain between the application for the warrant and the improvident arrest' if the officer who sought the warrant did not possess probable cause." *Brooks v. The City of Winston-Salem*, 85 F.3d 178, 184 n.7 (1997), *quoting Malley v. Briggs*, supra, 475 U.S. at 344 n.7. As Justice White observed in *Smith v. Gonzales*, supra, the Court, at long last, should "grant certiorari to resolve this significant, recurring question that has divided the lower courts." *Id.*, 459 U.S. at 1006.

III. It is the Clarity of the Relevant "Constitutional Rule" (And Not the Clarity of Statutory Law That Would Permit Liability for a Constitutional Violation) that Determines the Availability of Qualified Immunity Under § 1983, And Reaffirmation of That Principle Would Provide Important And Essential Guidance to Lower Courts Called Upon to Resolve Recurring Claims to Qualified Immunity.

The Court's prior decisions relating to qualified immunity under § 1983, while not conclusive, strongly indicate that Respondent Morrow's entitlement to qualified immunity must depend on whether the state of the law at the time he acted provided him with "fair warning" that his actions would likely result in a constitutional violation. Whether or not Morrow might reasonably have believed that he could *escape liability* for causing a constitutional violation, due to some lack of clarity under the qualified immunity doctrine or principles of "causation" under § 1983, would seem irrelevant to the question of whether a "*constitutional* rule already identified in the decisional law" sufficiently provided him that "fair warning." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (italics added). In other words, under Morrow's reasoning, which the Fifth Circuit has now fully adopted, a police officer is entitled to qualified immunity, regardless of the clarity of the "constitutional rule" governing his actions, if the remedial *statutory law* (or the decisional law interpreting it) was unclear about *whether he could be held liable* for knowingly causing a violation of the constitution. Just as the legal standard for whether (or when) punitive damages may be statutorily imposed under § 1983 is irrelevant for qualified immunity purposes, so too should the clarity (or

lack of clarity) of the remedial scope of § 1983's application. The Petitioner respectfully submits that it is the clarity of the substantive "constitutional rule" that provides the relevant "existing law" against which the "objective legal reasonableness" of Morrow's actions must be measured. The Court should resolve this important and recurring question, as the Fifth Circuit's "break in causation" doctrine, however stubbornly and "firmly ensconsed" it may be in the Fifth Circuit, should provide no safe harbor under the qualified immunity doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20667
Summary Calendar

KELLI BARRETT FITCH; ET AL.,

Plaintiffs,

KELLI BARRETT FITCH,

Plaintiff-Appellant.

versus

NORMAN D. MORROW,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(4:03-CV-1686)

Filed Aug. 30, 2006

Before GARZA, STEWART and DENNIS, Circuit Judges.

CARL E. STEWART, Circuit Judge:*

Plaintiff-Appellant Kelli Barrett Fitch ("Fitch") appeals the district court's grant of Defendant-Appellee

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Normand D. Morrow's ("Morrow") motion for summary judgment. Additionally, she requests that this court overrule its well-established "break in the causal chain" doctrine and ultimately determine that Morrow was not entitled to qualified immunity. We decline to do so; therefore, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Fitch and her husband initially brought suit under 42 U.S.C. § 1983 in state district court in Harris County, Texas, on April 19, 2002, claiming that an arrest warrant applied for by Morrow and issued for Fitch failed to particularly describe the person for whom probable cause existed, as required by the Particularity Clause of the Fourth Amendment to the United States Constitution. U.S. Const. amend. IV. They alleged negligence and slander claims arising out of her arrest based on mistaken identity. The suit was originally filed against PS Texas Holdings, LTD (d/b/a Public Storage), but Morrow was added in Fitch's second amended petition on January 16, 2003.[1]

[1] The underlying warrant arose from activities surrounding the rental of a self-storage facility. Jesse Salazar rented a self-service storage unit in Houston, Texas, and listed "Kelly Barrett" as his alternate contact and co-renter on the face of the storage facility contract. Thereafter, the manager of the facility began noticing that Salazar and Barrett were acting suspiciously. After several tenants' items were stolen from numerous storage units, the manager contacted the Harris County Sheriff's Department for assistance. Based on interviews with the storage facility manager and a renter whose storage unit had been broken into and his items taken, Morrow searched via a Harris County computer search engine for matches in the Houston area for persons of the same name that matched Salazar and Barrett's physical descriptions, addresses, age, etc. Morrow's

(Continued on following page)

The arrest warrant in question identified the subject as "Kelli Renee Barrett" (Fitch) of Katy, Texas; however, the warrant should have been issued for another party, "Kelly Barrett." Therefore, Fitch states that Morrow's arbitrary selection of her as the intended target of the arrest warrant was objectively unreasonable in light of the information readily available to him.

Morrow removed the case to federal court on May 19, 2003, and subsequently filed a motion to dismiss. The district court granted the motion to dismiss reasoning that, assuming arguendo that Fitch's Fourth Amendment rights had been violated by an invalid arrest warrant for which Morrow had applied, Morrow was entitled to qualified immunity under current Fifth Circuit case law. Specifically, the district court stated that, "Plaintiffs have not alleged that Morrow intentionally withheld or misrepresented any information in his sworn application for warrant. . . . [they] clearly alleged only that Morrow was negligent. . . . [t]herefore, Plaintiff's complaint shows on its face that it is barred."

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research led him to believe that Kelly Barrett was actually Kelli Renee Barrett (Fitch), even though the names were spelled differently. Eventually, Morrow signed a probable cause affidavit for her arrest and delivered it to the Harris County District Attorney's office for further processing. Fitch was arrested on May 1, 2001; however, it was later determined that she was not the same person listed on the rental agreement and, thus, she was released from jail. All of the records relating to Fitch's arrest and prosecution for the theft offenses were expunged and destroyed. Morrow has testified that he did not prepare the arrest warrant, meet with the magistrate judge that eventually signed the arrest warrant for Fitch, or personally arrest Fitch. Morrow also testified that he had no reason to believe that Kelly Barrett and Kelli Renee Barrett (Fitch) were not the same person.

On February 20, 2004, Fitch moved for reconsideration of the district court's order, requesting that it review its holding that the issuance of a warrant by a neutral and detached magistrate breaks the causal chain between an officer's application and a suspect's arrest. On the same day, Fitch also filed a third amended complaint, omitting her husband as a party, relinquishing her state law claims, and alleging "constitutional" claims sounding in negligence. The district court responded, denying Fitch's request to hold the "break in the causal chain" theory unlawful; however, it found that the third amended complaint successfully stated a cause of action.

On December 7, 2004, Morrow filed a motion for summary judgment, stating that his subjective good faith, both independently and in conjunction with the magistrate judge's decision to issue the warrant for Fitch's arrest, broke the casual chain and protected him from liability under § 1983. The district court issued its final judgment on August 1, 2005, finding that no genuine issue of material fact existed regarding the information Morrow provided to the magistrate judge who issued the warrant for Fitch's arrest. It also held that Fitch did not provide sufficient evidence to indicate that Morrow tainted the magistrate judge's decision to sign the warrant. From the district court's judgment, Fitch appeals.

DISCUSSION

A. Standard of Review

This court reviews a grant of summary judgment de novo, viewing the facts in the light most favorable to the non-movant. *Freeman v. County of Bexar*, 210 F.3d 550, 553 (5th Cir. 2000). Summary judgment is appropriate

when the pleadings, depositions, answers to interrogatories, admissions and/or affidavits show that there is no genuine issue of material fact. Fed.R.Civ.P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In the absence of a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

B. Qualified Immunity and Clearly Established Law

Fitch argues that this circuit's "break in the causal chain" doctrine is inconsistent with the element of causation enacted by Congress under § 1983 and Supreme Court precedent. This court has held that "an officer who acted with malice in procuring the warrant or the indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's independent decision breaks the causal chain and insulates the initiating party." *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988) (internal quotations omitted). Accordingly, because Fitch asserts that the doctrine should be invalidated, in turn, she asserts that Morrow is not entitled to be shielded by qualified immunity. She also conclusively states that summary judgment[2] was inappropriate in this case.

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[2] We do not consider Fitch's concise and conclusory statement in her brief regarding summary judgment because she did not reference specific facts in the summary judgment record which demonstrate a genuine issue of material fact. She does not discuss the summary judgment issue in the body of her argument nor does she offer evidence

(Continued on following page)

Morrow's conduct, however, is shielded by qualified immunity in light of clearly established law. *Saucier v. Katz*, 533 U.S. 194, 210-11 (2001). The clearly established law relied upon in applying the qualified immunity claim in this case is the "break in the causal chain" doctrine. Therefore, we must determine whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. Measuring the objective reasonableness of Morrow's conduct in reference to the law regarding the "break in the causal chain" doctrine that clearly existed at the time of the conduct in question, we hold that in this case, Morrow's conduct was objectively reasonable; his conduct did not violate Fitch's constitutional rights.

Under the "break in the causal chain" doctrine, once "facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party." *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1996) (internal citations omitted). The causal chain is not broken, however, "if the plaintiff affirmatively shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendants.'" *Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004) (citing *Taylor*, 36 F.3d at 456.). The "break in the causal chain" doctrine is "firmly ensconced circuit

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to support a finding that summary judgment was improperly granted. Because she has failed to adequately raise or brief any claimed genuine issue of material fact, she has essentially abandoned this issue on appeal and waived this panel's review of the district court's grant of summary judgment in favor of Morrow. *See* Fed. R.App. P. 28(a)(9).

precedent" that existed in 2000 when Morrow signed the probable cause affidavit and delivered the fruits of his investigation to the Harris County District Attorney's office. This panel is bound by the holdings of prior panels of this circuit, including their decisions detailing the impact and law surrounding this doctrine. Therefore, because we continue to recognize the "break in the causal chain" doctrine, we affirm the district court's decision to apply the qualified immunity doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20667
Summary Calendar

D.C. Docket No. 4:03-CV-1686

KELLI BARRETT FITCH; Et Al

Plaintiffs

KELLI BARRETT FITCH

Plaintiff-Appellant

v.

NORMAN D MORROW

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before GARZA, STEWART, and DENNIS, Circuit Judges.

JUDGMENT

(Filed Aug. 30, 2006)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:
SEP 21 2006

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

KELLI RENEE BARRETT FITCH, *Plaintiff(s)*	}	
v.	}	CIVIL ACTION NO.
NORMAN D. MORROW, in his individual capacity, *Defendant(s)*	}	H-03-1686

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 1, 2005)

Pending before the Court is Defendant Norman Morrow's motion for summary judgment (Doc. 24). For the reasons set forth below, the Court **ORDERS** that the motion is **GRANTED**. Final judgment is entered in favor of Defendant.

I. BACKGROUND AND RELEVANT FACTS

This is a § 1983 action in which the Plaintiff alleges that the Defendant, a deputy sheriff, acted unreasonably when he drafted and submitted an application for an arrest warrant that ultimately led to her wrongful arrest. The Defendant did not conduct the initial investigation underlying the arrest warrant, nor did he execute the warrant, which a magistrate independently reviewed and issued and which other officers in his department eventually executed. Plaintiff's central complaint is that the Defendant acted unreasonably and/or negligently when he

(1) mistakenly assumed, on the basis of a computer database search that yielded close similarities in name and physical description, that Plaintiff was the same person as the suspect identified in the offense report underlying the arrest; and (2) failed to disclose the discrepancies between Plaintiff's file in the computer database and the details in the offense report (*i.e.*, slight difference in name spelling, different street address, height difference) in the probable cause affidavit submitted to the magistrate who issued the arrest warrant. Plaintiff asserts a Fourth Amendment violation and seeks damages. Defendant asserts that he is entitled to qualified immunity and in particular that the "breaks the chain of causation" principle[1] applies in this case.

Plaintiff Kelli Renee Barrett Fitch ("Fitch") was arrested on or about 30 April 2001 at her home in Katy, Texas by officers executing a warrant charging her with felony burglary. Fitch was placed in handcuffs, transported to the Harris County jail, and held in confinement for several days until arraigned and allowed to post bond for her release. Fitch alleges that the facts leading up to her arrest are as follows.[2]

On November 15, 2000 Deputy D.L. Shinneman of the Harris County Sheriff's Department ("Shinneman") was dispatched to a "Public Storage" facility in Houston, Texas,

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[1] *See Murray v. Earle*, 405 F.3d 278, 290-93 (5th Cir. 2005) (discussing the "breaks the chain of causation" principle and its development and continuing viability in the Fifth Circuit).

[2] The factual summary set forth below is taken largely from the allegations in *Plainttiffs Third Amended Complaint* (Doc. 12). The Court agrees with Plaintiff that "[t]o a large extent the facts alleged by Plaintiff are undisputed by Defendant Morrow." Doc. 29 at 34.

in response to a reported "burglary of a building." Shortly after his arrival Shinneman spoke to Debbie Parks ("Parks"), who was then employed as a property manager at the "Public Storage" facility. Parks told Shinneman that she had seen two individuals leave the facility earlier in the day with two dark brown chairs in their vehicle. Parks stated that she personally knew these individuals by name and by sight as Jesse Salazar and ***Kelly Barrett***. Although Salazar had rented a storage unit at the facility, Parks stated that she had previously become suspicious of both Salazar and Kelly Barrett because they had never moved any personal property into the storage unit Salazar had rented; because they never used their assigned "gate code" when entering or leaving the premises (but had instead followed other vehicles in and out while the gate was still open); and because other tenants had reported property missing after Salazar and Kelly Barrett had been on the premises. Parks further informed Shinneman that Salazar had executed a written storage rental agreement for a single unit at the Public Storage facility. During her discussions with Shinneman on November 15, 2000, Parks retrieved that storage rental agreement for Shinneman's examination.

The information contained in the written storage rental agreement executed by Salazar, dated October 16, 2000, disclosed that Salazar had rented a single unit at the Public Storage facility, Unit "A113". When providing his "contact" information on the rental agreement, Salazar identified "5400 W. MT Houston TX 77040" as his address, and "(713) 687-1492" as his telephone number. In accordance with Public Storage's policy, Salazar, as a tenant, had also been required to execute a "Tenant Information Sheet" and identify the name and address of an "alternate

contact". On the written rental agreement itself, as his "alternate contact", Salazar had provided the name "**Kelly Barrett**", with the address "**11716 Clarkston #C, Katy, Texas 77429**", along with the telephone number "(281) 624-6597". Both Salazar, and one "Pat McGrew", who was a property manager at Public Storage, signed the rental agreement.

Based on the foregoing disclosures by Parks, at 1:15 p.m. on November 15, 2000, Shinneman typed and entered into a computer a "Detail Report for Harris County Law Enforcement", including a "narrative" of what he had discovered in connection with his dispatch and investigation of the theft at the Public Storage facility. In his initial narrative, among other information, Shinneman reported that "MRS. PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/_____) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." In a subsequent narrative entered into the computer immediately thereafter, Shinneman amended his report to state that "MRS. PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/ *KELLEY* BARRETT) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." (italics added). On a separate page of his written report, Shinneman identified Salazar as a suspect in the Public Storage facility theft as: "JESSE F. SALAZAR", with the address "5400 W. MT HOUSTON TX 77040", with the date of birth "053171", and Texas Driver's License Number "13321980". As for his second suspect, Shinneman identified "Kelly Barrett" as: "*KELLEY* BARRETT", with the address "11716 CLARKSTON KATY TX 77429", and did not include anywhere in his written report either a "date of birth" or "Driver's License Number" for "*KELLEY* BARRETT". Finally, in his narrative report entered on the

computer, Shinneman clearly noted that "PARKS STATED THAT SHE IS ABLE TO IDENTIFY THE SUSPECTS BY SITE [sic]." On November 17, 2000, Shinneman's final report entries were "approved", and a "case approval" was entered into the computer by, "RUGGIERO, S.D."

Some time during the two weeks after the entry of Shinneman's "Detail Report for Harris County Law Enforcement" into the computer, Defendant Norman D. Morrow ("Morrow") was assigned to investigate the theft at the Public Storage facility described above. It is the manner in which Morrow conducted his investigation and applied for an arrest warrant that constitutes the basis of Plaintiff's lawsuit. According to Plaintiff:

> . . . [W]hen Defendant Morrow attempted to discover additional identifying information for the suspect "Kelly Barrett" (as identified by the Public Storage records, including the rental agreement and "Tenant Information Sheet"), and/or "Kelley Barrett" (as identified by Shinneman in his written report entered on the computer), Morrow became frustrated with the lack [of] information available in Shinneman's reports. Being uncertain at this time as to the correct name for his suspect, "Kelly" or "Kelley" Barrett, Defendant Morrow thereupon resorted to use of a computer database with a search engine, such as "Soundex" or some similar device, that is programmed so that when used it returns not merely identifying information for a particular person whose name is accurately spelled out, or even a list of multiple persons whose names are spelled identically, but also includes in its return a list, with accompanying information, for all persons, in an *idem sonans* fashion, that have names that are phonetically similar.

Due to the nature of the computer generated search conducted by Defendant Morrow, and due in part to the size of the population of Harris County, Texas, which the United States Census Bureau enumerated at 3,400,578 in the year 2000, Defendant Morrow was then confronted with the names and accompanying identifying information for a large number of persons, any of whom might possibly have been the target of his investigation. However, none of the names listed in Defendant Morrow's computer generated search matched the information provided by Parks and Shinneman, which identified the intended suspect as "Kelly Barrett" or "Kelley Barrett", respectively. Nor did any of the information associated with the names listed in Defendant Morrow's computer generated search match the address for "Kelly" or "Kelley" Barrett given by both Parks and Shinneman, that is: "11716 Clarkston #C, Katy, Texas 77429".

After closer examination of his computer generated search results however, and while uncertain whether either of the names with which he had been provided by Shinneman and Parks were the correct name for his suspect, Defendant Morrow did discover the name of one "Kelli Renee Barrett", who was listed as living at a residential address in the City of Katy, Texas. The Greater City of Katy has an area of 180 square miles, and has a population in excess of 164,000 people. Although Defendant Morrow noted that the address for "Kelli Renee Barrett" was listed in his computer generated search as having a completely different street address than "11716 Clarkston #C, Katy, Texas 77429", and that the only commonality between the information he possessed for "Kelly Barrett" and "Kelli

> Renee Barrett" was that both were listed as residing in the City of Katy; Defendant Morrow, without any further investigation, and based solely on this computer generated search result, arbitrarily decided that the Plaintiff, "Kelli Renee Barrett", was the true target of his investigation.[3]

On December 1, 2000, Defendant Morrow prepared and presented to a Harris County, Texas magistrate an application for a felony arrest warrant, along with an accompanying affidavit which he had sworn out. Morrow's affidavit stated:

> **PROBABLE CAUSE**
>
> AFFIANT N.D. MORROW, IS EMPLOYED AS A PEACE OFFICER WITH THE HARRIS COUNTY SHERIFF'S DEPARTMENT. AFFIANT BELIEVES AND HAS REASON TO BELIEVE THAT THE DEFENDANTS, KELLI RENEE BARRETT, AND JUAN FRANSISCO SALAZAR, COMMITTED THE OFFENSE OF FELONY THEFT ON OR ABOUT NOVEMBER 15, 2000 IN HARRIS COUNTY, TEXAS.
>
> AFFIANT SPOKE TO WITNESS, DEBBI PARKS, WHO KNOWS BOTH DEFENDANTS BY SIGHT AND BY NAME AS TENANTS AT THE PUBLIC STORAGE WAREHOUSE LOCATED AT 6456 NORTH HIGHWAY 6 IN HARRIS COUNTY, TEXAS, WHERE THE WITNESS IS EMPLOYED AS A MANAGER. WITNESS TOLD AFFIANT THAT DEFENDANT JUAN SALAZAR HAD RENTED STORAGE SPACE AT HER LOCATION

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[3] *Id.* at 6-7.

AND HAD LISTED DEFENDANT KELLI BARRETT AS THE PERSON AUTHORIZED TO ENTER AND USE THE SPACE, BUT HAD NEVER MOVED ANY PROPERTY INTO THE SPACE. THE WITNESS TOLD AFFIANT THAT SHE HAD SEEN BOTH DEFENDANTS ON THE PROPERTY SEVERAL TIMES IN VARIOUS LOCATIONS WHERE THEY WERE NOT AUTHORIZED TO BE AND SHE HAD CAUTIONED THEM NOT TO WANDER AROUND THE PROPERTY.

ON NOVEMBER 15, 2000, THE WITNESS WAS ENTERING THE PROPERTY THROUGH THE SECURITY GATE WHEN SHE SAW A PICK UP TRUCK DRIVEN BY DEFENDANT JUAN SALAZAR WITH THE DEFENDANT KELLI BARRETT AS THE PASSENGER COMING FROM THE BUILDING ON THE OPPOSITE SIDE OF THE PROPERTY FROM WHERE THEY RENT SPACE. THE WITNESS SAW TWO WOODEN WING BACK CHAIRS AND ONE WOODEN HIGH BACK CHAIR IN THE BACK OF THE DEFENDANT'S TRUCK AS THE DEFENDANTS DROVE THROUGH THE GATE AND LEFT THE PROPERTY. THE WITNESS THEN WENT TO THE BUILDING AND SAW THE LOCKED *[sic]* REMOVED FROM UNIT #B-82 WHICH IS RENTED BY THE COMPLAINANT, EDMON CAREY DOWELL. THE WITNESS CONTACTED THE COMPLAINANT TO COME TO THE STORAGE LOCATION. UPON ARRIVAL THE COMPLAINANT FOUND THAT TWO MAHOGANY HIGH WING BACK CHAIRS VALUED AT $400.00 EACH, ONE MAHOGANY HIGH BACK OFFICE CHAIR VALUED AT $150.00, AND A THREE PIECE SERVICE FOR

> EIGHT SET OF CRYSTAL STEM WARE VALUED AT $1,500.00 HAD BEEN REMOVED FROM HIS STORAGE BUILDING. THE COMPLAINANT TOLD THE AFFIANT THAT HE DID NOT GIVE THE DEFENDANTS PERMISSION TO ENTER HIS STORAGE BUILDING NOR DID HE GIVE PERMISSION TO THE DEFENDANTS TO TAKE HIS PROPERTY. THE VALUE OF THE PROPERTY TAKEN IS $2,450.00. THE COMPLAINANT DESIRES PROSECUTION.[4]

On the same page but immediately above the foregoing narrative in his warrant application, Morrow included as identifying information the Plaintiff's correct name (prior to her marriage): "Kelli Renee Barrett"; Plaintiff's correct race: "W"; Plaintiff's correct gender: "F"; and Plaintiff's correct "SPN": "01346088". No information correctly identifying "Kelly Barrett" appeared anywhere on Defendant Morrow's sworn affidavit or application for his arrest warrant intended for "Kelly Barrett". Based upon the foregoing application that particularly described the Plaintiff, and which did not particularly describe in any fashion "Kelly Barrett", a felony warrant for the arrest of Plaintiff was issued by the magistrate. As noted above, Fitch was arrested at her home in April 2001 by officers (not including Morrow) executing this warrant.

Following the eventual dismissal and expunction of the felony criminal charge, Plaintiff filed suit in the 234th Judicial District Court of Harris County, Texas. Plaintiff notes that, prior to the removal of her claims to this Court,

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[4] *Id.* at 7-8.

Parks offered the following testimony in an affidavit filed with the state court:

> I told the deputy sheriffs that I could identify the persons who had given me their names as Jesse Salazar and Kelly Barrett. I also gave the deputy sheriff the address for 'Kelly Barrett' as listed in Public Storage records as 11716 Clarkston #C, Katy, Texas 77429. I also gave him a description of 'Kelly Barrett' as 5'7" and 110 to 120 pounds. I never gave any law enforcement official any other name, address, or physical description for 'Kelly Barrett'.
>
> I also spoke to other deputy sheriffs and/or detectives who came to the facility as other thefts were reported. At this point I do not recall speaking to a ND. Morrow, but I gave all deputy sheriffs and/or detectives that investigated the thefts the same information about Kelly Barrett and Jesse Salazar that I gave the first deputy sheriff.
>
> I was never asked by a deputy sheriff, detective, or any other law enforcement official to identify anyone as the persons I knew as Jesse Salazar or Kelly Barrett in a lineup, in a group of photographs, or any other method. I never gave a deputy sheriff, detective, or any other law enforcement official the name of Plaintiff Kelli Barrett Fitch, or her address, or her physical description, because I didn't even know she existed. I never identified Plaintiff Kelli Barrett Fitch in a lineup, in a group of photographs, or any other method, again because I did not even know she existed. I do not know why any law enforcement officer arrested Plaintiff Kelli Barrett Fitch for the theft at the facility, and did not ask anyone to arrest her. I did not even know that any law enforcement official had arrested anyone,

> much less Kelly Barrett Fitch, for the thefts at the facility until Plaintiff Kelli Barrett Fitch and her attorney came to the facility and told me about [sic] that she had been arrested.[5]

Plaintiff's suit was removed from state court to this Court on May 19, 2003. Based on the allegations in Plaintiffs second amended petition, which contained almost none of the allegations recited above, this Court granted Defendant Morrow's motion to dismiss. In particular, the Court stated the following:

> Plaintiffs have not alleged that Morrow intentionally withheld or misrepresented any information in his sworn application for the warrant. Rather, Plaintiffs have very clearly alleged only that Morrow was *negligent* in failing to conduct further investigation prior to swearing out the warrant application. Therefore, Plaintiffs' complaint shows on its face that it is barred by the holding in *Taylor v. Gregg,* and Fitch's § 1983 claim is dismissed.[6]

Plaintiff subsequently filed an amended complaint, which, partly in response to Defendant's assertion of qualified immunity, added a significant amount of detail to her factual allegations. In addition, Plaintiff filed an extremely strongly-worded motion for partial reconsideration, which in

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[5] *Id.* at 10.

[6] *Memorandum and Order of 04 February 2004* (Doc. 10) (citing *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994) ("It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating par[illegible] *f.*")); *see also Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982) *and Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988).

essence demanded that this Court cease following the "preposterous 'breaks the causal chain' theory."[7] After several pages of what can only be described as emotional venting, counsel for Plaintiff asserted the following:

> [T]he stark, significant and recurring question presented by the instant case is simply this: Just how long will the United States Court of Appeals for the Fifth Circuit, this Court, and other federal district courts bound by Fifth Circuit precedent, continue to openly ignore (if not consciously defy) the United States Supreme Court's express rejection of the "breaks the causal chain" theory?[8]

Subsequently, Morrow filed a response to the motion for partial reconsideration and a motion to dismiss the amended complaint, specifically asserting that the breaks the causal chain principle applies in this case.[9] This Court denied Plaintiffs motion for partial reconsideration, specifically holding that the breaks the causal chain principle was governing Fifth Circuit law.[10] In the same order, this Court also denied Morrow's motion to dismiss, holding that the new allegations in Plaintiff's amended complaint sufficed to state a § 1983 claim against Morrow for violation of her Fourth Amendment rights. The Court specifically directed the parties to address the issue of whether the breaks the causal chain principle applies in this case (*i.e.*, as a factual matter) on summary judgment.[11]

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[7] Doc. 11 at 9.

[8] *Id.* at 9-10.

[9] Doc. 14.

[10] *Memorandum and Order of 09 September 2004* (Doc. 21).

[11] *See, e.g., Sullivan v. Chastain*, 2005 WL 354032 at *3 (W.D. Tex. Jan. 04, 2005) (denying officer's motion to dismiss based on breaks the causal chain principle and noting that the plaintiff's allegation that the

(Continued on following page)

Morrow subsequently filed his motion for summary judgment, and Plaintiff has responded.

II. LEGAL STANDARD

The movant seeking a federal summary judgment initially must inform the court of the basis for his motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file that demonstrate the absence of a genuine issue of material fact and show that he is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The movant need not negate the opposing party's claims nor produce evidence showing an absence of a genuine factual issue, but may rely on the absence of evidence to support essential elements of opposing party's claims. *International Assoc. of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). The burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R. Civ. P. 56(c). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence

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officer "willfully and maliciously swore out a Complaint against [Plaintiff] without personal knowledge or probable cause" is "more properly examined on summary judgment, when both sides have had the opportunity to conduct discovery as to the actions of [the officer].").

and specific facts. *Anderson,* 477 U.S. at 256-57. He meets this burden only if he shows that "a reasonable jury could return a verdict for the non-moving party." *Id.* at 254. A mere scintilla of evidence will not preclude granting of a motion for summary judgment. *Id.* at 252.

All reasonable inferences must be drawn in favor of the non-moving party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574. 587-88 (1986), citing *United States v. Diebold,* 369 U.S. 654, 655 (1962). Once the burden of proof has shifted to the nonmovant, he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. Instead he must produce evidence upon which a jury could reasonably base a verdict in his favor. *Anderson,* 477 U.S. at 249. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.,* 477 U.S. at 249-50. Moreover the non-movant must "go beyond the pleadings and by her own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.,* 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment evidence. *Grimes v. Texas Dept. of Mental Health and Mental Retardation,* 102 F.3d 137, 139-40 (5th Cir. 1996); *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.), *cert. denied,* 513 U.S. 871 (1994); *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* 506 U.S. 825 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Texas Tech University,* 80 F.3d 1042,

1046 (5th Cir. 1996), *citing Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter,* 980 F.2d 299, 305 (5th Cir. 1992); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889 (1990). Nor is the district court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998), *citing Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied,* 506 U.S. 832 (1992).

III. ANALYSIS

The salient and ultimately controlling issue in this case is whether or not Norman's alleged actions *caused* Plaintiffs injuries for purposes of § 1983. Because Norman has made a showing that no genuine issue of material fact exists regarding the information he provided to the magistrate who ultimately issued the warrant for Plaintiff's arrest, and because Plaintiff has failed to marshal any evidence to indicate that Norman tainted the magistrate's deliberations in any way (*i.e.*, that Norman knowingly and recklessly misconstrued or withheld any relevant information), this Court holds that Norman is entitled to qualified immunity on Plaintiff's Fourth Amendment claim.

A. Framing the Qualified Immunity Analysis

The parties do not dispute the well established framework for conducting a qualified immunity analysis: "In undertaking a qualified immunity analysis, we must first determine whether the plaintiff has suffered a violation of his constitutional rights and, if so, whether a

reasonable official should have known that he was violating the plaintiffs constitutional rights."[12] Nor does there appear to be any dispute about the first prong of this analysis: Plaintiff asserts, and Morrow has not contested, that the arrest warrant in this case mistakenly named Plaintiff instead of the true suspect, Kelley Barrett, and that therefore a Fourth Amendment violation occurred. Since Morrow has not seriously contested this assertion, and instead based his motion for summary judgment entirely on the second prong of the analysis and in particular on the breaks the chain of causation principle, this Court will assume without deciding that a Fourth Amendment violation occurred. What remains to be decided, therefore, is whether Plaintiff can demonstrate that Morrow acted unreasonably, and in particular whether Morrow's actions proximately caused the damages she suffered.[13] This Court finds that, (1) contrary to Plaintiff's assertion, the "breaks the chain of causation" principle remains governing law in this circuit; (2) in light of this principle, Plaintiff cannot demonstrate that Morrow's actions proximately caused the damages she suffered; and

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[12] *Murray v. Earle*, 405 F.3d 278, 285 (5th Cir. 2005).

[13] *See id.* ("We hold that, because [Plaintiff] cannot demonstrate that defendants acted unreasonably, in that their actions did not proximately cause the damages that she suffered, she may not maintain a Fifth Amendment cause of action against them under § 1983."). Although *Murray* dealt with a Fifth Amendment claim, the Fifth Circuit's analysis in *Murray* is directly applicable to the present action. As discussed below, *Murray* makes clear that (1) the "breaks the chain of causation" principle is governing law in this circuit; and (2) the issue of *causation* is subsumed into the second prong of the qualified immunity analysis, so that a plaintiff who fails to demonstrate that there is at least a question of fact as to whether the damages she suffered were proximately caused by a defendant cannot maintain an action against that defendant under § 1983.

(3) accordingly, Morrow is entitled to qualified immunity and his motion for summary judgment should be granted.

B. Continuing Viability of the "Breaks the Chain of Causation" Principle

Since this Court's last substantive order in this action, which denied Plaintiff's request to topple the "breaks the chain of causation" principle, the Fifth Circuit has reaffirmed the continuing viability of that principle on at least three occasions.[14] In *Murray v. Earle*,[15] its most recent published opinion addressing the issue, the Fifth Circuit reversed a district court's denial of the defendants' motion for summary judgment on grounds of qualified immunity. The plaintiff in *Murray* was an eleven-year-old girl suspected of killing an even younger child. Travis county detectives took the girl into custody and secured a confession. This confession was proffered by the county attorneys at the girl's two criminal trials[16] and admitted by the state trial judge both times. Both trials resulted in convictions. Subsequently, the Texas Court of Appeals reversed the conviction, finding that the confession was inadmissible because the state law-enforcement authorities had violated Texas law by not taking the plaintiff before a magistrate prior to interrogating her. The girl then brought suit in federal district court seeking damages from numerous individuals, including the Travis County district attorneys

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[14] *Scribner v. Dillard*, 2005 WL 1199567 (5th Cir. May 20, 2005) (slip); *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005); *Shields v. Twiss*, 389 F.3d 142 (5th Cir. 2004).

[15] 405 F.3d 278 (5th Cir. 2005).

[16] The state trial judge *sua sponte* ordered a retrial after the first conviction.

and detectives involved in her criminal prosecution, for violations of her Fifth Amendment right against self-incrimination and for state law civil conspiracy. The district court denied the defendants' summary judgment motions for qualified immunity on the Fifth Amendment claims.

On appeal, the Fifth Circuit held that the girl was "in custody," that her confession was "involuntary," and that the confession's admission at trial "violated her Fifth Amendment right against self-incrimination."[17] Nevertheless, the Fifth Circuit reversed the district court's denial of qualified immunity because it held that the state judge's ruling on the admissibility of the confession "constituted a superseding cause of [the plaintiffs] injury, relieving the defendants of liability under § 1983."[18] In reaching this conclusion, the Fifth Circuit unambiguously reaffirmed the continuing viability of the "breaks the chain of causation" principle in this circuit.[19]

C. Applicability of the "Breaks the Chain of Causation" Principle to this Action

The "breaks the chain of causation" principle therefore remains governing law, and the Court rejects Plaintiff's repeated insistence that this Court ignore that principle. With respect to whether the "breaks the chain of causation" principle applies to the specific circumstances of this case, the uncontested summary judgment evidence demonstrates, in relevant part, the following:

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[17] 405 F.3d at 289.

[18] *Id.* at 293.

[19] *Id.* at 290-93.

- As a detective in the Harris County Sheriffs Department ("HCSD"), one of Morrow's typical duties was to review offense reports prepared by other deputy sheriffs when a crime has been committed.[20]

- Morrow reviewed the offense report in this case, which had been prepared by Shinneman. That report described the suspect as (1) a white female; (2) named "Kelley Barrett"; (3) residing at "11715 Clarkston, Katy, Texas"; (4) age 22 to 28 years old; (5) with brown hair; (6) weighing between 110 and 120 pounds; and (7) being 5'7" to 5'9" in height.[21]

- Consistent with routine HCSD procedure, after Morrow reviewed the offense report a search for the suspect identified by Shinneman was done in the Justice Information Management System (JIMS).[22] JIMS is a computerized database that contains information on persons that have been previously handled by the criminal justice system in Harris County. Such persons are given a unique identification number called a "SPN number" and their JIMS file contains information such as their physical description, last known address, date of birth, etc.[23]

- The JIMS search brought up Plaintiffs SPN and record. Specifically, the JIMS search identified (1) a white female; (2) named "Kelli Renee

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[20] Doc. 25, Morrow Affidavit, at 1.

[21] *Id.* at 4; Doc. 25, Offense Report.

[22] Morrow testified that he no longer recalls whether he actually performed this search or whether someone else did it. Morrow Affidavit at 3-4.

[23] Morrow Affidavit at 2; Wilson Affidavit at 2.

Barrett"; (3) residing at "1714 Briarchester Dr., Katy, Texas"; (4) age 26 years old; (5) with brown hair; (6) weighing 125 pounds; and (7) being 5'1" in height.[24]

- Thus, the person identified in the JIMS file matched the person identified in the offense report in all salient respects except the following: (1) the spelling of the first name was slightly different ("Kelley" and "Kelly" in the offense report, versus "Kelli" in JIMS); (2) different street addresses, though both addresses were in Katy, Texas; (3) the suspect in the offense report was list [sic] as being 6 to 8 inches taller than the person in the JIMS file.

- Morrow concluded that "[t]hese minor discrepancies (height and address) were not enough to lead me to believe that Kelley Barrett and Kelli Renee Barrett was not one and the same person."[25]

- Based on his review of the offense report and the JIMS report, Morrow signed the probable cause affidavit that was included in the package that the District Attorney used to file charges against the plaintiff in this case, *i.e.* Kelli Renee Barrett Fitch.[26]

- As a matter of routine procedure, probable cause affidavits such as the one in this case can be prepared by the HCSD detective, by the District Attorney's office, or jointly by personnel in both offices. Morrow "do[es] not remember who

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[24] Doc. 25, JIMS Printout.

[25] Morrow Affidavit at 4.

[26] *Id.* at 3.

prepared the probable cause affidavit in this case, whether it was me or the District Attorney's office." Nevertheless, as noted above, he did sign the completed affidavit.[27]

• At the time Morrow signed the affidavit he had never met the Plaintiff in this case, Kelli Renee Barrett Fitch. Plaintiff has adduced no evidence to suggest that Morrow had any independent reason to know that Kelley Barrett and Kelli Barrett were not one and the same person. Morrow asserts and the record indicates that the only information he based his decision to seek an arrest warrant on "was what was contained in the offense report and JIMS." Indeed, Plaintiff is not alleging that Morrow actively "tainted" the information provided to the magistrate. Rather, her complaint is that Morrow's *inference* that she was the same person as the Kelley Barrett described in the offense report was objectively unreasonable, and that with respect to the magistrate Morrow failed to disclose "the basis, if any, for his 'inferences.' "[28] In particular, according to Plaintiff, Morrow should have disclosed to the magistrate, *inter alia,* the discrepancies in height and residence addresses in the JIMS and the offense report.[29]

• Finally, Morrow testified as follows in his affidavit, and Plaintiff has adduced no evidence to rebut his assertions: "At no time did I ever bear any ill will or malice toward Kelli Barrett nor did I ever intentionally misstate any facts in the

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[27] *Id.* at 3, 5.

[28] Doc. 29 at 52.

[29] *Id.* at 49.

> probable cause affidavit that I signed. My total involvement in this case was to review the offense report, consult with the District Attorney's office, participate in the preparation of the probable cause affidavit, sign the probable cause affidavit which I in good faith believed to be accurate, and assist the District Attorney's office in assembling the documentation needed by the District Attorney's office to file appropriate criminal charges as the District Attorney saw fit. I had no involvement in the actual arrest of Kelli Barrett or the preparation of the arrest warrant itself."[30]

In sum, the summary judgment record demonstrates that, with respect to the probable cause affidavit, Officer Morrow was, at most, guilty of negligent omission: he failed to inform the magistrate of the discrepancies between the description of the suspect in the offense report and the description of Plaintiff in her JIMS file, and consequently of his conclusion that these discrepancies were not sufficiently great to suggest that two different people (with many similar characteristics) were being described. Regardless of how one might characterize Officer Morrow's logic – reasonable, unreasonable, somewhat reasonable – there is no question of fact in this case but that he acted in good faith – negligently, perhaps, but with no malicious intent. Indeed, Plaintiff does not even *allege* that Morrow acted maliciously or in bad faith. Under these circumstances, the Court finds that Morrow is entitled to qualified immunity and that, accordingly, his motion for summary judgment must be granted. Even assuming that there was a Fourth Amendment violation in this case and that Officer Morrow's logic was questionable

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[30] Morrow Affidavit at 6.

and his omissions in the probable cause affidavit negligent, the Court finds that under prevailing Fifth Circuit precedent the "breaks the causal chain" principle still applies to this action. The Court finds *Garris v. Rowland,* 678 F.2d 1264 (5th Cir. 1982), to be particularly instructive.[31] In that case, the officer who submitted the probable cause affidavit committed substantially more glaring omissions and even several misrepresentations in its preparation.[32] Nevertheless, after alluding to the then-novel "breaks the causal chain" principle, the Fifth Circuit concluded that because the officer's actions were at most negligent and not malicious or in bad faith the officer was entitled to qualified immunity:

> . . . [I]n this case, the jury findings indicate that Rowland acted negligently, not intentionally or recklessly. Accordingly, neither plaintiff's facial or subfacial challenge to the affidavit warrants a finding that Officer Rowland himself is liable for

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[31] Indeed, the Court specifically instructed the parties to address the applicability of *Garris* to this action, should Morrow elect to assert that the "breaks the chain of causation" principle applied herein. Doc. 21 at 14. In his motion for summary judgment Morrow did assert that that principle applies and did reference *Garris.* For her part, Plaintiff submitted a lengthy brief and did cite *Garris* and discuss the "breaks the chain of causation" principle at length. Plaintiff wholly failed, however, to provide any discussion as to why *Garris* is distinguishable from this action and/or why, based on governing Fifth Circuit precedent, *Garris* should not control the qualified immunity issue before this Court.

[32] 678 F.2d at 1267-68 (In the affidavit . . . Rowland stated the facts as he knew them, but made the crucial mistake of misrepresenting certain material facts as being within his personal knowledge. . . . Based upon the misrepresentations in the warrant and unaware that material facts contained within were the product of fourth-hand hearsay, a Tarrant County Magistrate issued a warrant for Garris' arrest.").

its deficiencies so as to deny him qualified immunity.[33]

The Court finds that the same conclusion is required in this action. The summary judgment record establishes that Officer Morrow's actions were at most negligent. Like the substantially more culpable officer in *Garris,* Officer Morrow signed the probable cause affidavit in good faith and sent it to the District Attorney's office for review and approval. The affidavit was ultimately put before an independent magistrate. Under these circumstances, the Court finds that the "breaks the chain of causation" principle applies and that, therefore, Officer Morrow is entitled to qualified immunity. The motion for summary judgment is granted.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Officer Morrow is entitled to qualified immunity and that his motion for summary judgment should be granted. Final judgment is entered in favor of Defendant.

SIGNED at Houston, Texas, this 1st day of August, 2005.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

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[33] *Id.* at 1274.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KELLI RENEE BARRETT FITCH, *Plaintiff(s)*	}	
v.	}	CIVIL ACTION
NORMAN D. MORROW, in his individual capacity, *Defendant(s)*	}	NO. H-03-1686

FINAL JUDGMENT

(Filed 08/01/2005)

Pursuant to the Memorandum Opinion and Order of this date, the Court granted Defendant's motion for summary judgment in all respects. Accordingly, the Court hereby enters final judgment in favor of Defendant Norman Morrow. Plaintiff Kelli Renee Barrett Fitch is to bear all costs of action.

SIGNED at Houston, Texas, this 1st day of August, 2005.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KELLI RENEE BARRETT FITCH, *Plaintiff(s)*	}	CIVIL ACTION NO. H-03-1686
v.	}	
NORMAN D. MORROW, in his individual capacity, *Defendant(s)*	}	

MEMORANDUM AND ORDER

(Filed 09/08/2004)

Pending before the Court is Plaintiff Kelli Renee Barrett Fitch's motion for partial reconsideration (Doc. 11) and Defendant Norman Morrow's motion to dismiss (Doc. 14). For the reasons set forth below, the Court **ORDERS** that both motions are **DENIED.**

I. BACKGROUND AND RELEVANT FACTS

This is a § 1983 action in which the Plaintiff alleges that the Defendant, a deputy sheriff, acted unreasonably when he drafted and submitted an application for an arrest warrant that ultimately led to her wrongful arrest. The Defendant did not conduct the initial investigation underlying the arrest warrant, nor did he execute the warrant, which a magistrate independently reviewed and issued and which other officers in his department eventually executed. Plaintiff asserts a Fourth Amendment violation and seeks damages.

Plaintiff Kelli Renee Barrett Fitch ("Fitch") was arrested on or about 30 April 2001 at her home in Katy, Texas by officers executing a warrant charging her with felony burglary. Fitch was placed in handcuffs, transported to the Harris County jail, and held in confinement for several days until arraigned and allowed to post bond for her release. Fitch alleges that the facts leading up to her arrest are as follows.[1]

On November 15, 2000 Deputy D.L. Shinneman of the Harris County Sheriffs Department ("Shinneman") was dispatched to a "Public Storage" facility in Houston, Texas, in response to a reported "burglary of a building." Shortly after his arrival Shinneman spoke to Debbie Parks ("Parks"), who was then employed as a property manager at the "Public Storage" facility. Parks told Shinneman that she had seen two individuals leave the facility earlier in the day with two dark brown chairs in their vehicle. Parks stated that she personally knew these individuals by name and by sight as Jesse Salazar and ***Kelly Barrett.*** Although Salazar had rented a storage unit at the facility, Parks stated that she had previously become suspicious of both Salazar and Kelly Barrett because they had never moved any personal property into the storage unit Salazar had rented; because they never used their assigned "gate code" when entering or leaving the premises (but had instead followed other vehicles in and out while the gate was still open); and because other tenants had reported property missing after Salazar and Kelly Barrett had been on the premises. Parks further informed Shinneman that Salazar had executed a written storage rental agreement

[1] The following facts are all based on allegations in *Plaintiff's Third Amended Complaint* (Doc. 12).

for a single unit at the Public Storage facility. During her discussions with Shinneman on November 15, 2000, Parks retrieved that storage rental agreement for Shinneman's examination.

The information contained in the written storage rental agreement executed by Salazar, dated October 16, 2000, disclosed that Salazar had rented a single unit at the Public Storage facility, Unit "A113". When providing his "contact" information on the rental agreement, Salazar identified "5400 W. MT Houston TX 77040" as his address, and "(713) 687-1492" as his telephone number. In accordance with Public Storage's policy, Salazar, as a tenant, had also been required to execute a "Tenant Information Sheet" and identify the name and address of an "alternate contact". On the written rental agreement itself, as his "alternate contact", Salazar had provided the name "**Kelly Barrett**", with the address "**11716 Clarkston #C, Katy, Texas 77429**", along with the telephone number "(281) 624-6597". Both Salazar, and one "Pat McGrew", who was a property manager at Public Storage, signed the rental agreement.

Based on the foregoing disclosures by Parks, at 1:15 p.m. on November 15, 2000, Shinneman typed and entered into a computer a "Detail Report for Harris County Law Enforcement", including a "narrative" of what he had discovered in connection with his dispatch and investigation of the theft at the Public Storage facility. In his initial narrative, among other information, Shinneman reported that "MRS. PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/___) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." In a subsequent narrative entered into the computer immediately thereafter, Shinneman amended his report to state that "MRS.

PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/*KELLEY* BARRETT) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." (italics added). On a separate page of his written report, Shinneman identified Salazar as a suspect in the Public Storage facility theft as: "JESSE F. SALAZAR", with the address "5400 W. MT HOUSTON TX 77040", with the date of birth "053171", and Texas Driver's License Number "13321980". As for his second suspect, Shinneman identified "Kelly Barrett" as: "*KELLEY* BARRETT", with the address "11716 CLARKSTON KATY TX 77429", and did not include anywhere in his written report either a "date of birth" or "Driver's License Number" for "*KELLEY* BARRETT". Finally, in his narrative report entered on the computer, Shinneman clearly noted that "PARKS STATED THAT SHE IS ABLE TO IDENTIFY THE SUSPECTS BY SITE [sic]." On November 17, 2000, Shinneman's final report entries were "approved", and a "case approval" was entered into the computer by, "RUGGIERO, S.D."

Some time during the two weeks after the entry of Shinneman's "Detail Report for Harris County Law Enforcement" into the computer, Defendant Norman D. Morrow ("Morrow") was assigned to investigate the theft at the Public Storage facility described above. It is the manner in which Morrow conducted his investigation and applied for an arrest warrant that constitutes the basis of Plaintiff 's lawsuit. According to Plaintiff,

> . . . [W]hen Defendant Morrow attempted to discover additional identifying information for the suspect "Kelly Barrett" (as identified by the Public Storage records, including the rental agreement and "Tenant Information Sheet"), and/or "Kelley Barrett" (as identified by Shinneman in his

written report entered on the computer), Morrow became frustrated with the lack [of] information available in Shinneman's reports. Being uncertain at this time as to the correct name for his suspect, "Kelly" or "Kelley" Barrett, Defendant Morrow thereupon resorted to use of a computer database with a search engine, such as "Soundex" or some similar device, that is programmed so that when used it returns not merely identifying information for a particular person whose name is accurately spelled out, or even a list of multiple persons whose names are spelled identically, but also includes in its return a list, with accompanying information, for all persons, in an *idem sonans* fashion, that have names that are phonetically similar.

Due to the nature of the computer generated search conducted by Defendant Morrow, and due in part to the size of the population of Harris County, Texas, which the United States Census Bureau enumerated at 3, 400, 578 in the year 2000, Defendant Morrow was then confronted with the names and accompanying identifying information for a large number of persons, any of whom might possibly have been the target of his investigation. However, none of the names listed in Defendant Morrow's computer generated search matched the information provided by Parks and Shinneman, which identified the intended suspect as "Kelly Barrett" or "Kelley Barrett", respectively. Nor did any of the information associated with the names listed in Defendant Morrow's computer generated search match the address for "Kelly" or "Kelley" Barrett given by both Parks and Shinneman, that is: "11716 Clarkston #C, Katy, Texas 77429".

> After closer examination of his computer generated search results however, and while uncertain whether either of the names with which he had been provided by Shinneman and Parks were the correct name for his suspect, Defendant Morrow did discover the name of one "Kelli Renee Barrett", who was listed as living at a residential address in the City of Katy, Texas. The Greater City of Katy has an area of 180 square miles, and has a population in excess of 164,000 people. Although Defendant Morrow noted that the address for "Kelli Renee Barrett" was listed in his computer generated search as having a completely different street address than "11716 Clarkston #C, Katy, Texas 77429", and that the only commonality between the information he possessed for "Kelly Barrett" and "Kelli Renee Barrett" was that both were listed as residing in the City of Katy; Defendant Morrow, without any further investigation, and based solely on this computer generated search result, arbitrarily decided that the Plaintiff, "Kelli Renee Barrett", was the true target of his investigation.[2]

On December 1, 2000, Defendant Morrow prepared and presented to a Harris County, Texas magistrate an application for a felony arrest warrant, along with an accompanying affidavit which he had sworn out. Morrow's affidavit stated:

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[2] *Id.* at 6-7.

PROBABLE CAUSE

AFFIANT N.D. MORROW, IS EMPLOYED AS A PEACE OFFICER WITH THE HARRIS COUNTY SHERIFF'S DEPARTMENT. AFFIANT BELIEVES AND HAS REASON TO BELIEVE THAT THE DEFENDANTS, KELLI RENEE BARRETT, AND JUAN FRANSISCO SALAZAR, COMMITTED THE OFFENSE OF FELONY THEFT ON OR ABOUT NOVEMBER 15, 2000 IN HARRIS COUNTY, TEXAS.

AFFIANT SPOKE TO WITNESS, DEBBI PARKS, WHO KNOWS BOTH DEFENDANTS BY SIGHT AND BY NAME AS TENANTS AT THE PUBLIC STORAGE WAREHOUSE LOCATED AT 6456 NORTH HIGHWAY 6 IN HARRIS COUNTY, TEXAS, WHERE THE WITNESS IS EMPLOYED AS A MANAGER. WITNESS TOLD AFFIANT THAT DEFENDANT JUAN SALAZAR HAD RENTED STORAGE SPACE AT HER LOCATION AND HAD LISTED DEFENDANT KELLI BARRETT AS THE PERSON AUTHORIZED TO ENTER AND USE THE SPACE, BUT HAD NEVER MOVED ANY PROPERTY INTO THE SPACE. THE WITNESS TOLD AFFIANT THAT SHE HAD SEEN BOTH DEFENDANTS ON THE PROPERTY SEVERAL TIMES IN VARIOUS LOCATIONS WHERE THEY WERE NOT AUTHORIZED TO BE AND SHE HAD CAUTIONED THEM NOT TO WANDER AROUND THE PROPERTY.

ON NOVEMBER 15, 2000, THE WITNESS WAS ENTERING THE PROPERTY THROUGH THE SECURITY GATE WHEN SHE SAW A PICK UP TRUCK DRIVEN BY DEFENDANT JUAN SALAZAR WITH THE DEFENDANT KELLI BARRETT AS THE PASSENGER COMING FROM

> THE BUILDING ON THE OPPOSITE SIDE OF THE PROPERTY FROM WHERE THEY RENT SPACE. THE WITNESS SAW TWO WOODEN WING BACK CHAIRS AND ONE WOODEN HIGH BACK CHAIR IN THE BACK OF THE DEFENDANT'S TRUCK AS THE DEFENDANTS DROVE THROUGH THE GATE AND LEFT THE PROPERTY. THE WITNESS THEN WENT TO THE BUILDING AND SAW THE LOCKED REMOVED FROM UNIT #B-82 WHICH IS RENTED BY THE COMPLAINANT, EDMON CAREY DOWELL. THE WITNESS CONTACTED THE COMPLAINANT TO COME TO THE STORAGE LOCATION. UPON ARRIVAL THE COMPLAINANT FOUND THAT TWO MAHOGANY HIGH WING BACK CHAIRS VALUED AT $400.00 EACH, ONE MAHOGANY HIGH BACK OFFICE CHAIR VALUED AT $150.00, AND A THREE PIECE SERVICE FOR EIGHT SET OF CRYSTAL STEM WARE VALUED AT $1,500.00 HAD BEEN REMOVED FROM HIS STORAGE BUILDING. THE COMPLAINANT TOLD THE AFFIANT THAT HE DID NOT GIVE THE DEFENDANTS PERMISSION TO ENTER HIS STORAGE BUILDING NOR DID HE GIVE PERMISSION TO THE DEFENDANTS TO TAKE HIS PROPERTY. THE VALUE OF THE PROPERTY TAKEN IS $2,450.00. THE COMPLAINANT DESIRES PROSECUTION.[3]

On the same page but immediately above the foregoing narrative in his warrant application, Morrow included as identifying information the Plaintiff's correct name (prior to her marriage): "Kelli Renee Barrett"; Plaintiff's correct race: "W"; Plaintiff's correct gender: "F"; and Plaintiff's

[3] *Id.* at 7-8.

correct "SPN": "01346088". No information correctly identifying "Kelly Barrett" appeared anywhere on Defendant Morrow's sworn affidavit or application for his arrest warrant intended for "Kelly Barrett". Based upon the foregoing application that particularly described the Plaintiff, and which did not particularly describe in any fashion "Kelly Barrett", a felony warrant for the arrest of Plaintiff was issued by the magistrate. As noted above, Fitch was arrested at her home in April 2001 by officers (not including Morrow) executing this warrant.

Following the eventual dismissal and expunction of the felony criminal charge, Plaintiff filed suit in the 234th Judicial District Court of Harris County, Texas. Plaintiff notes that, prior to the removal of her claims to this Court, Parks offered the following testimony in an affidavit filed with the state court:

> I told the deputy sheriffs that I could identify the persons who had given me their names as Jesse Salazar and Kelly Barrett. I also gave the deputy sheriff the address for 'Kelly Barrett' as listed in Public Storage records as 11716 Clarkston #C, Katy, Texas 77429. I also gave him a description of 'Kelly Barrett' as 5'7" and 110 to 120 pounds. I never gave any law enforcement official any other name, address, or physical description for 'Kelly Barrett'.
>
> I also spoke to other deputy sheriffs and/or detectives who came to the facility as other thefts were reported. At this point I do not recall speaking to a N.D. Morrow, but I gave all deputy sheriffs and/or detectives that investigated the thefts the same information about Kelly Barrett and Jesse Salazar that I gave the first deputy sheriff

> I was never asked by a deputy sheriff, detective, or any other law enforcement official to identify anyone as the persons I knew as Jesse Salazar or Kelly Barrett in a lineup, in a group of photographs, or any other method. I never gave a deputy sheriff, detective, or any other law enforcement official the name of Plaintiff Kelli Barrett Fitch, or her address, or her physical description, because I didn't even know she existed. I never identified Plaintiff Kelli Barrett Fitch in a lineup, in a group of photographs, or any other method, again because I did not even know she existed. I do not know why any law enforcement officer arrested Plaintiff Kelli Barrett Fitch for the theft at the facility, and did not ask anyone to arrest her. I did not even know that any law enforcement official had arrested anyone, much less Kelly Barrett Fitch, for the thefts at the facility until Plaintiff Kelli Barrett Fitch and her attorney came to the facility and told me about [sic] that she had been arrested.[4]

Plaintiff's suit was removed from state court to this Court on May 19, 2003. Based on the allegations in Plaintiff's second amended petition, which contained almost none of the allegations recited above, this Court granted Defendant Morrow's motion to dismiss. In particular, the Court stated the following:

> Plaintiffs have not alleged that Morrow intentionally withheld or misrepresented any information in his sworn application for the warrant. Rather, Plaintiffs have very clearly alleged only that Morrow was *negligent* in failing to conduct further investigation prior to swearing out the

[4] *Id* at 10.

> warrant application. Therefore, Plaintiffs' complaint shows on its face that it is barred by the holding in *Taylor v. Gregg*, and Fitch's § 1983 claim is dismissed.[5]

Plaintiff subsequently filed an amended complaint, which, partly in response to Defendant's assertion of qualified immunity, added a significant amount of detail to her factual allegations. In addition, Plaintiff filed a motion for partial reconsideration, asking this Court to reconsider what Plaintiff considered to be two separate holdings: (1) "its holding that in order to state a claim for a *Fourth Amendment* violation predicated on the arrest of Plaintiff caused by Defendant Morrow, she must allege that when applying for the arrest warrant Defendant Morrow 'intentionally withheld or misrepresented' information in his sworn application for the warrant"; and (2) "its decision which holds that under Title 42, U.S.C. Section 1983, the issuance of a warrant by a neutral and detached magistrate 'breaks the causal chain' between a police officer's application and an ensuing arrest."[6] Subsequently, Morrow filed a response to the motion for partial reconsideration and "Motion to Dismiss Plaintiff's Third Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)."

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[5] *Memorandum and Order of 04 February 2004* (Doc. 10) (citing *Taylor v Gregg*, 36 F.3d 453, 456 (5th Cir. 1994) ("It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party.")); *see also Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982) *and Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988).

[6] Doc. 11 at 2.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) is "viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982). A court dismisses a complaint under Rule 12(b)(6) only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2nd ed. 1990). A plaintiff must, however, assert more than general legal conclusions to avoid dismissal. *Jefferson v. Lead Industries Assoc., Inc.*, 106 F.3d 1245, 1250 (5th Cir. 1997). "[T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (quoting 3 WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1216 at 156-159). Where a complaint asserts merely conclusory allegations, these conclusory allegations and unwarranted deductions of fact are not admitted as true. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Second, where a complaint shows on its face that it is barred by an affirmative defense, a court may dismiss the action for failing to state a claim. *Kaiser Aluminum*, 677 F.2d at 1050.

In considering a Rule 12(b)(6) motion to dismiss a district court may review the pleadings on file, *Collins v.*

Morgan Stanley Dean Witter, 224 F.3d 496, 498-99 (5th Cir. 2000), and matters of public record. *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995). "Pleadings on file" includes "[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to [its] claim." *Collins*, 224 F.3d at 498-99.

III. ANALYSIS

A. Plaintiffs Motion for Reconsideration and the "Breaks the Causal Chain Theory"

In an inappropriately emotional, often openly insulting submission, counsel for Plaintiff lambasted this Court for applying the "preposterous 'breaks the causal chain' theory"[7] to his client's claims against Morrow. After several pages of what can only be described as emotional venting – venting which was both extraordinarily unprofessional and, ironically, admittedly futile, as will immediately be shown – Plaintiff's attorney finally got to the point:

> [T]he stark, significant and recurring question presented by the instant case is simply this: Just how long will the United States Court of Appeals for the Fifth Circuit, this Court, and other federal district courts bound by Fifth Circuit precedent, continue to openly ignore (if not consciously defy) the United States Supreme Court's express rejection of the "breaks the causal chain" theory?[8]

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[7] *Id.* at 9.

[8] *Id.* at 9-10.

The "express rejection" of the "breaks the causal chain" theory referred to by counsel is dicta in *Malley v. Briggs*.[9] The Fifth Circuit chose to maintain its "breaks the causal chain" theory in spite of this dicta. This Court, as counsel himself seems to know, is one of those "federal district courts bound by Fifth Circuit precedent." Accordingly, this Court cannot "reconsider" or otherwise purport to overrule the "breaks the causal chain" theory, no matter how preposterous that theory may seem to counsel or how emotional its application by this Court might make him feel.[10]

The "breaks the causal chain theory" was stated by the Fifth Circuit as follows in *Taylor v. Gregg*:

> It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party. This Court has held that [even] an officer who acted with malice in procuring the warrant or the indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a

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[9] 475 U.S. 335, 344 n.7 (1986) ("Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983.").

[10] The Court will not waste any more of its time referring to the improprieties in Plaintiff's counsel's motion for reconsideration. However, the Court hereby warns Mr. Gladden for the first and only time that if he has any more emotional venting to do it had better not be done in any submissions to or arguments before this Court.

> grand jury, for that intermediary's independent decision breaks the causal chain and insulates the initiating party. . . . the chain of causation is broken only where all the facts are presented to the grand jury or magistrate and the malicious motive of the officer does not lead him to withhold any relevant information.[11]

It is precisely the two points just quoted by this Court – (1) that the issuance of a warrant by a magistrate breaks the chain of causation and (2) that the chain of causation is broken only if the initiating party does not withhold relevant information from the magistrate – that counsel for Plaintiff asks this Court to "reconsider." Far from pointing to authority to support his position, however, Plaintiff's counsel *submits* to the Court that binding Fifth Circuit precedent espouses the "breaks the causal chain" theory. Accordingly, the motion for reconsideration is denied.

One other point raised in Plaintiff's motion for reconsideration should be addressed, if only for purposes of clarification. Plaintiff's counsel stated in his brief that this Court "inject[ed] a subjective state of mind requirement into its Fourth Amendment analysis," thereby "plac[ing] itself in direct conflict with well-settled Supreme Court precedent."[12] Counsel appears to have misconstrued this Court's statement regarding the parameters of the "breaks the causal chain" theory, which relates to the issue of *causation*, as a statement regarding a state of mind requirement for a Fourth Amendment violation. In its

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[11] 36 F.3d 453, 456 (5th Cir. 1994).

[12] Doc. 11 at 2.

Order granting Defendant's first motion to dismiss, this Court stated the following in relevant part:

> Plaintiffs have not alleged that Morrow intentionally withheld or misrepresented any information in his sworn application for the warrant. Rather, Plaintiffs have very clearly alleged only that Morrow was *negligent* in failing to conduct further investigation prior to swearing out the warrant application. Therefore, Plaintiffs' complaint shows on its face that it is barred by the holding in *Taylor v. Gregg* [*i.e.*, the "breaks the causal chain" theory], and Fitch's § 1983 claim is dismissed.[13]

Previously Plaintiff alleged only that Morrow failed to conduct a sufficiently thorough investigation; she had not alleged that Morrow intentionally failed to disclose all relevant information to the magistrate. Thus, in addressing the issue of *causation*, this Court applied Fifth Circuit precedent, which as noted above holds that "the chain of causation is broken only where all the facts are presented to the grand jury or magistrate and the *malicious motive* of the officer does not lead him to withhold any relevant information."[14] Because there was no allegation of any

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[13] *Memorandum and Order of 04 February* 2004 (Doc. 10) (citing *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1994) ("It is well settled that if facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party.")); *see also Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982) *and Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988).

[14] 36 F.3d 453, 456 (5th Cir. 1994) (emphasis added); *see also Garris v. Rowland*, 678 F.2d 1264, 1273 n.6 (5th Cir. 1982) ("[W]e have traditionally held that the magistrate's determination of probable cause breaks the chain of causation and insulates the initiating party from liability. See *Smith v. Gonzales, supra; Rodriguez v. Ritchey, supra.*

(Continued on following page)

intentional, malicious misrepresentation or omission to the magistrate, this Court applied the "breaks the causal chain" theory and properly dismissed Plaintiff's Fourth Amendment claim. The Court, however, did not then and does not now hold that there is a particular state of mind requirement with respect to establishing a Fourth Amendment violation.[15]

B. Defendant's Motion to Dismiss

Given the analysis above, the Court need not engage in an extensive discussion with respect to Defendant's motion to dismiss. In contrast to her second amended

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Plaintiff asserts that this form of quasi-judicial immunity would permit an officer to prepare an erroneous affidavit in order to obtain a warrant and then 'hide behind' the erroneously issued warrant to escape liability for constitutional deprivations. Similar concerns were also expressed by Judge Hill in his concurring opinion in *Rodriguez*; however, even Judge Hill recognized that *the police officer's actions must be malicious or in bad faith*, a situation not presently before us.") (emphasis added).

[15] On the other hand, even if a § 1983 plaintiff can establish that the Fourth Amendment was violated, there does appear to be a state of mind requirement, in appropriate circumstances, with respect to establishing an unbroken chain of causation under the Fifth Circuit's "breaks the causal chain theory." *See supra* note 13. Under *Garris* as well as the other progeny of *Smith* and *Rodriguez*, it appears that a police officer who withholds information from a magistrate must do so maliciously or in bad faith in order for the chain of causation to remain intact. (As discussed below, *see supra* page 14, the parties are to address this issue in any briefing on summary judgment.) Thus, it is possible, as occurred in *Garris*, that a plaintiff wrongfully arrested because of an inappropriately obtained warrant may establish liability against the municipal authorities but not against the individual officer who filed the application for the warrant. In the case at bar, however, plaintiff has elected to press her claim only against Morrow in his individual capacity.

petition, Plaintiff now specifically alleges that Morrow failed to "disclose to the issuing magistrate some reasonably available modicum of information suggesting that 'Kelli Renee Barrett' and 'Kelly Barrett' were one and the same person."[16] Morrow's motion to dismiss does not address this allegation and indeed does nothing more than respond to Plaintiff's contentions regarding *Malley* and *Groh v. Ramirez*,[17] a more recent but no less inapposite Supreme Court opinion. Plaintiff has now plainly stated a § 1983 claim for violation of her Fourth Amendment rights. In short, Plaintiff has alleged that (1) Morrow acted unreasonably in conducting his investigation and preparing his application for a warrant; (2) Morrow acted unreasonably in failing to disclose to the magistrate in question how tenuous the link between "Kelly Barrett" (the suspect actually described by Parks) and "Kelli Renee Barrett" (the Plaintiff herein) actually was; and (3) Morrow's acts and omissions led to Plaintiff's wrongful arrest. The Court finds that these allegations are sufficient to state a claim against Morrow,[18] and the motion to dismiss is denied.

Plaintiff has also now pled her allegations with sufficient specificity to address Defendant's assertion of qualified immunity. The Court will rule on Morrow's qualified immunity defense, if necessary, on summary judgment. The parties are instructed, however, that any motions for summary judgment should take care to distinguish between the issues of *qualified immunity* and *causation*, in particular the "breaks the causal chain"

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[16] *Plaintiff's Third Amended Complaint* (Doc. 12) at 11.

[17] 124 S.Ct. 1284 (2004).

[18] *See Garris v. Rowland*, 678 F.2d 1264 (5th Cir. 1982); *see also Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989).

theory. Should Morrow assert that the only available evidence establishes that the "breaks the causal chain" theory applies to this case, the parties are directed to address the holding in *Garris v. Rowland*, 678 F.2d 1264 (5th Cir. 1982), in addition to any other relevant authorities. Furthermore, unless he has a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,"[19] counsel for Plaintiff should limit his arguments to governing Fifth Circuit law. This Court has absolutely no interest in reading any further outcries by counsel announcing his personal, emotional beliefs of what the law ought to be.

IV. CONCLUSION

Plaintiff's motion for reconsideration asks this Court to hold the "breaks the causal chain" theory unlawful. Whatever the merits of that theory, the "breaks the causal chain" principle is supported by Fifth Circuit precedent that is binding on this Court. The motion for reconsideration is denied. Plaintiff has, however, adequately stated her § 1983 claim in her third amended complaint, and she has likewise pled her allegations with sufficient specificity to address Defendant's assertion of qualified immunity. Defendant's motion to dismiss is therefore denied.

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[19] Fed. R. Civ. P. 11(b)(2).

SO ORDERED at Houston, Texas, this 8th day of September, 2004.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES
DISTRICT JUDGE

OPPOSITION BRIEF

(1)

No. 06-723

FILED
FEB 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

KELLI BARRETT FITCH,

Petitioner,

v.

NORMAN D. MORROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether certiorari should be denied because Petitioner failed to present with accuracy and clarity what is essential to ready and adequate understanding of the points requiring consideration in this civil rights lawsuit alleging a Fourth Amendment claim for wrongful arrest based on mistaken identity.

2. Whether certiorari should be denied because this Court's review of the Fifth Circuit's "break in causation" doctrine could not affect the rights of the parties to this case since Petitioner abandoned review in the Fifth Circuit of the district court's grant of summary judgment in Respondent's favor and thus cannot resuscitate her claims against Respondent in this Court.

3. Whether certiorari should be denied because this Court's review of the Fifth Circuit's "break in causation" doctrine could not affect the rights of the parties to this case because this doctrine was well established Fifth Circuit law when Petitioner's cause of action allegedly arose.

PARTIES TO THE PROCEEDING

No parties other than those listed in the caption (Petitioner Kelli Barrett Fitch and Respondent Norman D. Morrow) were parties to the proceeding in the court whose judgment is sought to be reviewed.

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STATEMENT OF JURISDICTION

Respondent agrees that this Court has discretion to grant a petition for writ of certiorari in accordance with 28 U.S.C.A. § 1254(1) (West 2006), but would note that this Court does not render advisory opinions or decide questions that cannot affect the rights of the litigants in the case before it. *Prieser v. Newkirk*, 422 U.S. 395, 401 (1975).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Title 42, Section 1983, of the United States Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act

> or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 2003).

STATEMENT OF THE CASE

A. Proceedings Below

This is a civil rights lawsuit alleging a Fourth Amendment claim for wrongful arrest based on mistaken identity. On April 19, 2002, arrestee Kelli Renee Barrett Fitch ("Petitioner") and her husband, Brian Fitch, filed a state court action against PS Texas Holdings, LTD (d/b/a Public Storage, Inc.) and Debbie Parks, alleging that their negligence proximately caused her to be wrongfully arrested.[1] *R. Vol. 3, pp. 301-08.* The Fitches asserted that " . . . Public Storage, Inc. acting through its agent, Debbie Parks, informed N.D. Morrow that Kelli Renee Barrett had committed a theft at Public Storage and caused him to complete and swear out a warrant for the arrest of Kelli Barrett for felony theft of property from the premises of Public Storage at 6456 North Highway 6 in Houston, Texas." *R. Vol. 3, p. 307.*

On January 16, 2003, the Fitches filed a Second Amended Petition, asserting the same claims against PS

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[1] *See* Cause No. 2002-20014; *Fitch, et al. v. PS Texas Holdings, LTD (d/b/a Public Storage, Inc.) et al.* (in the 234th Judicial District Court of Harris County, Texas). *See also R. Vol. 3, pp. 297, 291-98 (Fitches' Apr. 29, 2002 First Amended Petition).*

Texas Holdings and Debbie Parks and adding Harris County Sheriff's Department Detective Norman Morrow ("Respondent") as a party defendant. *R. Vol. 3, pp. 262-70.* The Fitches alleged state law negligence and gross negligence claims against Respondent, contending that he failed to properly inquire as to the identity of the person leasing or having access to the leased premises; failed to properly inquire as to the identity of persons with access to the leased premises; failed to properly investigate the identity of the correct name of the accused person; failed to identify the difference in identity between the accused person and the Petitioner; and failed to request that the identity of the accused person suggested by the employee [Debbie Parks] be verified by "the witness[es] prior to the time that the arrest warrant occurred or a warrant issued." *R. Vol. 3, pp. 266-67.* In addition, the Fitches first raised a civil rights claim, alleging that Petitioner was unreasonably seized without probable cause in violation of 42 U.S.C. § 1983.[2] *R. Vol. 3, p. 265.*

On April 21, 2003, Respondent was served with process, and on May 19, 2003, removed this case to the Houston Division of the United States District Court for the Southern District of Texas.[3] *R. Vol. 3, pp. 24, 318.* Thereafter, Respondent answered the Fitches' Second

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[2] *Compare Petition, p. 2* (wherein Petitioner incorrectly represents that she raised a civil rights claim in her April 19, 2002 Original Petition).

[3] On May 1, 2003, the presiding judge of the 234th Judicial District Court granted the original defendants' motion for summary judgment. *R. Vol. 3, pp. 19-20.* On May 16, 2003, the court granted these defendants' motion for severance, and severed the Fitches' claims against these defendants into Cause No. 2002-20014-A. *R. Vol. 3, pp. 4-7.* The Fitches filed no appeal from this state court judgment.

Amended Complaint and moved to dismiss pursuant to FED. R. CIV. P. 12.[4] *R. Vol. 2, pp. 325-34.*

On February 6, 2004, the district court granted Respondent's motion to dismiss, explaining, in part, that:

> Plaintiffs have not alleged that Morrow intentionally withheld or misrepresented any information in his sworn application for the warrant. Rather, Plaintiffs have very clearly alleged only that Morrow was negligent in failing to conduct further investigation prior to swearing out the warrant application. Therefore, Plaintiffs' complaint shows on its face that it is barred by the holding in *Taylor v. Gregg*, and Fitch's § 1983 claim is dismissed.

R. Vol. 2, pp. 346, 345-48.

On February 20, 2004, Petitioner sought reconsideration of this order in a vitriolic submission found by the district court to be "inappropriately emotional [and] often openly insulting." *R. Vol. 2, pp. 360-61, 366-67, 349-69, 417 & n. 10, 418 (Petitioner's App. B38, B39 & n. 10).* That same day, Petitioner filed her Third Amended Complaint, omitting Brian Fitch as a party plaintiff, omitting her state law claims and alleging constitutional claims sounding in negligence. *R. Vol. 2, pp. 370-84.* On September 9, 2004, the district court issued an order on these motions, finding that Petitioner's Third Amended Complaint stated a cause of action and denying Petitioner's request to hold the "break in causal chain" theory unlawful. *R. Vol. 2, pp. 413-27.*

On December 7, 2004, Respondent moved for summary judgment. *R. Vol. 2, pp. 440-487.* On March 21, 2005,

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[4] When responding to this motion, the Fitches clarified that Morrow was being sued solely in his individual capacity. *R. Vol. 2, p. 339.*

Petitioner responded to this motion, but failed to provide any evidence that raised a genuine issue of material fact. *R. Vol. 1, pp. 505-98.*

On August 1, 2005, the district court granted Respondent's motion for summary judgment on qualified immunity grounds, finding, in part, that no genuine issue of material fact existed regarding the information Respondent provided to the magistrate who ultimately issued the warrant for Petitioner's arrest, and that Petitioner failed to marshal any evidence indicating that Respondent tainted the magistrate's deliberations in any way (*i.e.*, that Respondent knowingly and recklessly misconstrued or withheld any relevant information). *R. Vol. 1, pp. 599-616* (*Petitioner's App. B1-24*).

On August 5, 2005, Petitioner filed a timely notice of appeal from the final judgment. *R. Vol. 1, pp. 617-18.* On August 30, 2006, the Fifth Circuit affirmed the district court's judgment in an unpublished opinion, finding that Petitioner failed to raise or brief any claimed genuine issue on appeal and thus waived review of the district court's grant of summary judgment in Respondent's favor. *Petitioner's App. A5-6 n. 2.* Measuring the objective reasonableness of Respondent's conduct "in reference to the law regarding the 'break in causal chain' doctrine that clearly existed at the time of the conduct in question," the Fifth Circuit also held that Respondent's conduct was objectively reasonable and did not violate Petitioner's constitutional rights. *Petitioner's App. A6.*

B. Statement of Facts[5]

1. Events leading to investigation of "Jesse Salazar's" and "Kelly Barrett's" November 15, 2000 burglary of a building

The uncontested summary judgment proof showed that on October 16, 2000, Jesse Salazar rented a self-service storage unit at a "Public Storage" facility located at 6456 North Highway 6 in Houston, Texas. *R. Vol. 3, p. 153 (Apr. 9, 2003 Affidavit of Debbie Parks)*; *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*. Salazar identified "Kelly Barrett" as his alternate contact and, in an attached "Tenant Information Sheet," authorized her to access his storage unit. *R. Vol. 3, pp. 152-53 (Apr. 9, 2003 Affidavit of Debbie Parks)*; *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*; *R. Vol. 2, p. 464 (Tenant Information Sheet)*.

Beginning in November, 2000, Public Storage property manager Debbie Parks became suspicious of the activities of Jesse Salazar and Kelly Barrett at the facility because: (1) Salazar and Barrett never used their own gate code to enter and exit the storage unit area, choosing instead to always follow other tenants in and out of the facility's access gates; and (2) other tenants repeatedly reported that items were missing from their storage units after Salazar and Kelly visited the storage facility. *R. Vol. 3, p. 152 (Apr. 9, 2003 Affidavit of Debbie Parks)*.

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[5] Respondent objects to Petitioner's Statement of Facts because it largely incorporates and is based upon allegations made by Petitioner in her Third Amended Complaint, rather than competent summary judgment proof. *See Petition, pp. 3-5*. A party defending against a motion for summary judgment may not rely upon unsworn allegations in her pleadings, but must by affidavit or otherwise set forth specific facts showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

On November 15, 2000, Parks noticed that the lock was missing on Unit No. B-82. *Id.* Edmon Dowell, who leased this unit, was called about the missing lock. *Id.* Dowell came to the Public Storage facility and, after inspecting his unit, told Parks that items were missing. *Id.* Dowell contacted the Harris County Sheriff's Department for assistance. *R. Vol. 2, p. 474* (*Shinneman's "Detail Report for Law Enforcement"*) (*"Offense Report"*).

2. Deputy D.L. Shinneman's initial investigation of the burglary

Later that same morning, Harris County Deputy Sheriff D.L. Shinneman was dispatched to the Public Storage facility, where he interviewed Dowell and Parks regarding the burglary. *Id., pp. 469-78*; *R. Vol. 3, p. 152* (*Apr. 9, 2003 Affidavit of Debbie Parks*).

Dowell advised that after cutting the lock on his storage unit, unknown suspects entered the unit and, without his consent, removed his property, including crystal stemware, mahogany wood wingback chairs and a high back office chair worth approximately $2,450.00 – $2,600.00. *R. Vol. 2, pp. 476, 474* (*Shinneman's Offense Report*).

Parks reported that Salazar and Barrett arrived at the Public Storage facility at about 7:15 that same morning, and did not use their gate code to enter the facility. *Id., p. 474.* Parks stated that although she could not prove that Salazar and Barrett stole anything, she was suspicious of them because they never used their gate code for entry into or exit from the storage facility (but had instead followed other vehicles in and out of the facility while the gate was still open), and because other tenants reported that items were missing from their storage units after

Salazar and Barrett visited the facility. *Id.*; *R. Vol. 3, p. 152 (Apr. 9, 2003 Affidavit of Debbie Parks)*. Parks also advised Shinneman that she had noticed Salazar and Barrett leaving the facility at about 7:45 that same morning with two dark brown chairs. *R. Vol. 2, p. 474 (Shinneman's Offense Report)*; *R. Vol. 3, p. 152 (Apr. 9, 2003 Affidavit of Debbie Parks)*. Parks had learned from Dowell that "these were his chairs." *R. Vol. 3, p. 152 (Apr. 9, 2003 Affidavit of Debbie Parks)*.

Parks also reported that Salazar had executed a written storage rental agreement for a single unit ("A 113") at the Public Storage facility on October 16, 2000, and retrieved the agreement for Shinneman's examination. The rental agreement disclosed that Salazar identified "5400 W. Mt. Houston Tx. 77040" as his address, and "(713) 687-1492" as his telephone number. *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*. The rental agreement also showed that Salazar identified "Kelly Barrett" as his alternate contact, and listed her address as "11715 Clarkston #C, Katy, Texas 77429," and her telephone number as "(281) 624-6597." *R. Vol. 3, pp. 152-53 (Apr. 9, 2003 Affidavit of Debbie Parks)*; *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*. Salazar and Pat McGrew, another property manager at Public Storage, signed the rental agreement. *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*.

In accordance with Public Storage's policy, Salazar was also required to execute a "tenant information sheet" and identify the name and address of an "alternate contact." *See R. Vol. 3, pp. 152-53 (Apr. 9, 2003 Affidavit of Debbie Parks)*; *R. Vol. 2, p. 465 (Oct. 16, 2000 Rental Agreement)*. The tenant information sheet revealed that Salazar identified "Kelly Barrett" as his alternate contact, gave the same address and telephone number for her as

those included in the rental agreement, and authorized her to access his storage unit. *R. Vol. 2, p. 464 (Tenant Information Sheet).*

Parks gave Shinneman the 11715 Clarkston, #C, Katy, Texas 77429 address for "Kelly Barrett" that was included in Public Storage's records. *See R. Vol. 3, p. 152 (Apr. 9, 2003 Affidavit of Debbie Parks).* Parks told Shinneman that "Kelly Barrett" was 5'7" to 5'9" tall and weighed 110 to 120 pounds. *Id.* Parks also informed Shinneman that she could identify Salazar and Barrett by sight. *Id.*

Early that same afternoon, Shinneman typed and entered into a computer a "Detail Report for Harris County Law Enforcement" ("offense report"), including a "narrative" of what he had discovered in connection with his dispatch and investigation of the theft at the Public Storage facility. *R. Vol. 2, pp. 469-78 (Shinneman's Offense Report).* In his initial narrative, among other information, Shinneman reported that "MRS. PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/___) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." *Id., p. 470.* In a narrative entered into the computer immediately thereafter, Shinneman amended his report to state that "MRS. PARKS ADVISED THAT THE SUSPECTS (JESSE SALAZAR/*KELLEY* BARRETT) WERE SEEN LEAVING THE STORAGE COMPLEX THIS MORNING." *Id., p. 474 (emphasis added).*

Shinneman identified Salazar as a suspect in the Public Storage facility theft as: "JESSE F. SALAZAR" (a/k/a Juan Salazar and Jesse Sanchez) with the address "5400 W. MT HOUSTON TX 77040," with the date of birth "053171," and Texas Driver's License Number "13321980." *Id., p. 475.*

In this same report, Shinneman identified "Kelly Barrett," the second suspect, as: "*KELLEY* BARRETT," with the address "11715 CLARKSTON KATY TX 77429," and did not include anywhere in his written report either a "date of birth" or "Driver's License Number" for "*KELLEY* BARRETT." *Id., pp. 476, 469-78.* Shinneman described Barrett as a white female with brown hair, who was 22 to 28 years old, 5'7" to 5'9" tall and weighed 110 to 120 pounds. *Id., p. 476.*

Shinneman noted that "PARKS STATED THAT SHE IS ABLE TO IDENTIFY THE SUSPECTS BY SITE *[sic]*," and that the case was being turned over to the detectives for further investigation. *Id., p. 474.* On November 17, 2000, Shinneman's final report entries were "approved" and a "case approval" was entered into the computer by, "RUGGIERO, S.D." *Id., p. 477.*

3. Respondent's participation in the investigation of the burglary

Some time during the two weeks after the entry of Shinneman's offense report into the computer, Respondent was assigned to follow-up on the investigation of the November 15, 2000 burglary at the Public Storage facility.[6]

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[6] Respondent has been employed by the Harris County Sheriff's Office as a Deputy Sheriff since 1982, and has been a detective with the office since 1994. *R. Vol. 2, p. 487 (Morrow's Dec. 7, 2004 Affidavit).* Among other duties, Respondent reviews offense reports that are typically prepared by a deputy sheriff who initially investigates an alleged crime. *Id.* The offense report contains information the investigating officer is able to compile with respect to the offense itself after, for example, interviewing the complaining witness and any other persons who might have information concerning the alleged crime. *Id., pp. 486-87.* The investigating officer identifies alleged suspects by name, if possible, and provides, to the extent available, other identifiers

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R. Vol. 1, pp. 526-27, 532 (Respondent's Nov. 4, 2004 Deposition). Respondent attempted to positively identify "Kelley Barrett," the second suspect referenced by Shinneman, during his follow-up of Shinneman's investigation. *Id., p. 521.*

In this connection, Respondent reviewed Shinneman's offense reports and personally spoke with Debbie Parks. *Id., pp. 532, 529-30, 526; R. Vol. 1, p. 505 (Respondent's*

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relating to the suspect. *Id., p. 486.* When Respondent receives an offense report, he reviews it and consults with the Harris County District Attorney's office to determine if there is enough information to bring criminal charges against the suspect(s) named in the offense report. *Id. See R. Vol. 2, pp. 453-54 (Wilson's Dec. 7, 2004 Affidavit).* If the Assistant District Attorney determines that charges should be brought against a suspect, Respondent, in consultation with the District Attorney's office, prepares the documentary package that is necessary to seek an arrest warrant for the suspect(s) and for the District Attorney to file charges. *R. Vol. 2, p. 486 (Respondent's Dec. 7, 2004 Affidavit); R. Vol. 2, p. 453 (Wilson's Dec. 7, 2004 Affidavit).* The typical documentation package includes a copy of the investigative officer's offense report, a probable cause affidavit that is prepared in conjunction with the District Attorney's office and signed by Respondent, and other available supporting information that might assist in identifying the alleged suspect(s). *Id.* Quite often, the Harris County Sheriff's Office uses the Justice Information Management System ("JIMS") to obtain descriptions and previous addresses relating to the suspect(s). *Id.* JIMS is a computerized data base that contains information regarding persons who have been previously handled by the criminal justice system in Harris County, Texas. *Id.* Typically, when an individual arrested and handled by the Harris County Criminal Justice System, he or she is given an identifying number called a SPN number, and information about that individual is inputted into the JIMS system cross-referenced to the SPN number. *Id. See also R. Vol. 1, p. 521 (Morrow's Nov. 4, 2004 Deposition).* This information includes the individual's name, date of birth, physical description, last known address, booking information and any other information regarding the individual that can be ascertained at the time of arrest. *R. Vol. 2, p. 486 (Respondent's Dec. 7, 2004 Affidavit); R. Vol. 2, p. 453 (Wilson's Dec. 7, 2004 Affidavit).*

Dec. 1, 2000 Probable Cause Affidavit). *See also R. Vol. 1, pp. 511-12* (*Respondent's Nov. 4, 2004 Deposition*) (regarding Respondent's reliance upon information provided by Shinneman and Parks). During Respondent's conversation with Parks, she confirmed her earlier report to Shinneman and noted she was also suspicious of Salazar and Barrett because they had never moved any personal property into the storage unit rented by Salazar. *R. Vol. 1, p. 505* (*Respondent's Dec. 1, 2004 Probable Cause Affidavit*).

Given the identification and description of "Kelley Barrett" of "11715 Clarkston, Katy, Texas," Respondent performed or reviewed the results of a search for Barrett on Harris County's JIMS system.[7] *R. Vol. 2, pp. 484-85* (*Respondent's Dec. 7, 2004 Affidavit*). This JIMS search returned a "Kelli Renee Barrett" with a last known address in Katy, Texas.[8] *Id., p. 484*; *R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*).[9]

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[7] Four years after-the-fact, Respondent could not confirm that he used JIMS to collect additional information regarding this investigation, *R. Vol. 1, pp. 523* (*Morrow's Nov. 4, 2004 Deposition*), and could not confirm whether he or someone else personally performed a JIMS search seeking to ascertain information relating to "Kelley Barrett." *R. Vol. 2, pp. 484-85* (*Respondent's Dec. 7, 2004 Affidavit*). Respondent was able to confirm that he relies upon JIMS to assist him in his investigations, that he normally "runs" suspects on JIMS to determine their criminal backgrounds, and that he could think of no other search by which he could have secured "Kelli Renee Barrett's" name. *R. Vol. 1, pp. 522-24* (*Respondent's Nov. 4, 2004 Deposition*).

[8] "Kelli Renee Barrett" is Petitioner's maiden name.

[9] Deputy Morrow designated Assistant District Attorney Ted Wilson of the Harris County District Attorney's Office as an expert witness in this case. *R. Vol. 2, pp. 428-29*. Wilson has been employed by the Harris County District Attorney's Office as an Assistant District Attorney since 1974. *R. Vol. 2, p. 454* (*Wilson's Dec. 7, 2004 Affidavit*). Among other duties, Wilson reviews probable cause affidavits and documentation packets submitted by peace officers to determine

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This JIMS search also yielded information regarding "Kelli Renee Barrett's" physical description. *R. Vol. 2, pp. 484-85 (Morrow's Dec. 7, 2004 Affidavit).* "Kelley Barrett," the suspect identified in Shinneman's offense report, was described in the offense report as being 22 to 28 years old. "Kelli Renee Barrett" was described in JIMS as being 26 years old. *Id., p. 484. See also R. Vol. 2, p. 452 (Wilson's Dec. 7, 2004 Affidavit).*

Shinneman's offense report described "Kelley Barrett" as a white female with brown hair weighing between 110 and 120 pounds. "Kelli Renee Barrett" was described in JIMS as being a white female with brown hair weighing 125 pounds. *R. Vol. 2, p. 484 (Respondent's Dec. 7, 2004 Affidavit). See also R. Vol. 2, pp. 451-52 (Wilson's Dec. 7, 2004 Affidavit).*

Shinneman's offense report described "Kelley Barrett" as being 5'7" to 5'9" in height. *R. Vol. 2, p. 476 (Shinneman's Offense Report).* "Kelli Renee Barrett" was described in JIMS as being 5'1" in height. *R. Vol. 2, p. 484 (Morrow's Dec. 7, 2004 Affidavit). See also R. Vol. 2, p. 451 (Wilson's Dec. 7, 2004 Affidavit).*

The height descriptors and street addresses included in Shinneman's offense report and JIMS were the only items that did not completely match up. *Id.* In Respondent's experience, however, it was not unusual for lay witnesses to inaccurately estimate the height of individuals they were attempting to describe. *R. Vol. 2, p. 484 (Respondent's Dec. 7, 2004 Affidavit).* In Respondent's experience, it was not unusual for people identified in

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whether criminal charges should be filed against perpetrators when a crime has been committed. *Id.* These documents are also used to seek arrest warrants for the suspected perpetrator(s). *Id.*

JIMS to move and change addresses such that the last known address shown in JIMS would not necessarily be accurate or current. *Id.*; *R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*). Respondent also knew that Katy, Texas is a small community west of Houston, Texas,[10] that the name Barrett was not a common name, and that the names "Kelley," "Kelli" and "Kellie" were often misspelled and interchanged.[11] *R. Vol. 2, p. 484* (*Respondent's Dec. 7, 2004 Affidavit*); *R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*). These minor discrepancies were not enough to lead Respondent to believe that Kelley Barrett and Petitioner Kelli Renee Barrett were not one and the same person. *R. Vol. 2, p. 484* (*Morrow's Dec. 7, 2004 Affidavit*).

It is unclear whether Respondent actually prepared the probable cause affidavit at issue in this case.[12] In any

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[10] Petitioner testified that she believed that Katy had a population of approximately 12,000 people. *R. Vol. 2, p. 459* (*Petitioner's Nov. 4, 2004 Deposition*).

[11] Petitioner herself acknowledged that her first name could be spelled "Kelli," "Kelly" or "Kelley," and is often misspelled. *R. Vol. 2, pp. 459-60* (*Petitioner's Nov. 4, 2004 Deposition*). The rental agreement and Shinneman's offense report contained different versions of Kelly. *R. Vol. 2, p. 484* (*Respondent's Dec. 7, 2004 Affidavit*); *R. Vol. 2, p. 465* (*Rental Agreement*) ("Kelly"); *R. Vol. 2, p. 464* ("*Tenant Information Sheet*") ("Kelly"); *R. Vol. 2, pp. 476, 474* (*Shinneman's Offense Report*) ("Kelley"). *See also R. Vol. 2, p. 452* (*Wilson's Dec. 7, 2004 Affidavit*) (noting differences between spelling of "Kelli's" name in offense report and JIMS).

[12] It is common practice in Harris County that the probable cause affidavit is sometimes prepared by a peace officer, is sometimes prepared by district attorneys employed in the Harris County District Attorney's office, and is sometimes prepared as a joint effort. *R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*); *R. Vol. 2, p. 483* (*Respondent's Dec. 7, 2004 Affidavit*). After the final wording is reviewed by an assistant district attorney, the probable cause affidavit is signed by the peace officer. *R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*). Respondent routinely consulted with the District Attorney's office regarding

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event, Respondent believed that the identifying information contained in the affidavit at issue was consistent with the information contained in JIMS. *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*. Respondent did not meet or know "Kelli Renee Barrett" prior to that point in time when he signed the affidavit.[13] *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*. The only information Respondent had concerning "Kelli Renee Barrett" was the information contained in the offense report and JIMS. *Id.* Respondent had no reason to believe that "Kelley Barrett" and "Kelli Renee Barrett" were not the same person.[14] *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*.

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the wording used in his probable cause affidavits when he prepared the affidavits, *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*, but, four years after-the-fact, could not remember whether he or the District Attorney's office actually prepared the probable cause affidavit. *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*; *R. Vol. 1, pp. 521, 529 (Respondent's Nov. 4, 2004 Deposition)*. When attempting to recall the extent of his participation in the events allegedly giving rise to this lawsuit against him, Respondent did not have the benefit of review of the finalized probable cause affidavit, his supplemental report and the rest of the documentation package relating to the filing of charges against Petitioner because all underlying records relating to Petitioner's arrest were, at her request, expunged prior to the time she filed this civil rights suit. *R. Vol. 2, p. 485 (Respondent's Dec. 7, 2004 Affidavit)*; *R. Vol. 1, pp. 526-27 (Respondent's Nov. 4, 2004 Deposition)*; *R. Vol. 2, pp. 432-36 (Agreed Order Expunging Records)*.

[13] Petitioner confirmed that she and Respondent did not know each other when "all this took place." *R. Vol. 2, p. 461 (Petitioner's Nov. 4, 2004 Deposition)*. In fact, Petitioner testified that she first "laid eyes on," met and spoke to Respondent at her November 4, 2004 deposition. *R. Vol. 2, p. 461 (Petitioner's Nov. 4, 2004 Deposition)*.

[14] Prior to applying for the warrant, Respondent acted with diligence to ascertain the truth of the facts contained in the warrant. *R. Vol. 1, p. 516 (Respondent's Nov. 4, 2004 Deposition)*. Respondent received legal advice from an attorney. *Id.*, p. 518. Respondent did not recall whether he told the attorney that he had two different spellings for the suspect's name because he did not have and thus could not

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On [illegible]ember 1, 2000, Respondent swore out the probable cause affidavit that was included in the package that the District Attorney used to file charges against Kelli Renee Barrett. *Id., p. 485*; *R. Vol. 1, p. 505* (*Respondent's Dec. 1, 2000 Probable Cause Affidavit*); *R. Vol. 1, p. 532* (*Respondent's Nov. 4, 2004 Deposition*). Under "Probable Cause," Respondent stated:

> AFFIANT N.D. MORROW, IS EMPLOYED AS A PEACE OFFICER WITH THE HARRIS COUNTY SHERIFF'S DEPARTMENT. AFFIANT BELIEVES AND HAS REASON TO BELIEVE THAT THE DEFENDANTS, KELLI RENEE BARRETT, AND JUAN FRANCISCO SALAZAR, COMMITTED THE OFFENSE OF FELONY THEFT ON OR ABOUT NOVEMBER 15, 2000 IN HARRIS COUNTY, TEXAS.
>
> AFFIANT SPOKE TO WITNESS, DEBBI PARKS, WHO KNOWS BOTH DEFENDANTS BY SIGHT AND BY NAME AS TENANTS AT THE PUBLIC STORAGE WAREHOUSE LOCATED AT 6456 NORTH HIGHWAY 6 IN HARRIS COUNTY, TEXAS, WHERE THE WITNESS IS EMPLOYED AS A MANAGER. WITNESS TOLD AFFIANT THAT DEFENDANT JUAN SALAZAR HAD RENTED STORAGE SPACE AT

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review his report. *Id., pp. 516, 518.* Respondent confirmed that he withheld no important facts from that attorney. *Id., p. 518.* In response to opposing counsel's questions, Respondent also testified: (1) that he did not remember noting in the probable cause affidavit that the second suspect was identified as "Kelly" in the rental agreement and Tenant Information Sheet and that the investigating officer recorded "Kelley" in his offense report; (2) that he did not withhold any important facts from the application that was to be presented to the Magistrate; and (3) that he did not believe he stated the facts incorrectly when applying for an arrest warrant. *Id., pp. 515-16.*

HER LOCATION AND HAD LISTED DEFENDANT KELLI BARRETT AS A PERSON AUTHORIZED TO ENTER AND USE THE SPACE, BUT HAD NEVER MOVED ANY PROPERTY INTO THE SPACE. THE WITNESS TOLD AFFIANT THAT SHE HAD SEEN BOTH DEFENDANTS ON THE PROPERTY SEVERAL TIMES IN VARIOUS LOCATIONS WHERE THEY WERE NOT AUTHORIZED TO BE AND SHE HAD CAUTIONED THEM NOT TO WANDER AROUND THE PROPERTY.

ON NOVEMBER 15, 2000, THE WITNESS WAS ENTERING THE PROPERTY THROUGH THE SECURITY GATE WHEN SHE SAW A PICK UP TRUCK DRIVEN BY DEFENDANT JUAN SALAZAR WITH THE DEFENDANT KELLI BARRETT AS PASSENGER COMING FROM THE BUILDING ON THE OPPOSITE SIDE OF THE PROPERTY FROM WHERE THEY RENT SPACE. THE WITNESS SAW TWO WOODEN WING BACK CHAIRS AND ONE WOODEN HIGH BACK OFFICE CHAIR IN THE BACK OF THE DEFENDANT'S TRUCK AS THE DEFENDANTS DROVE THROUGH THE GATE AND LEFT THE PROPERTY. THE WITNESS THEN WENT TO THE BUILDING AND FOUND THE LOCK REMOVED FROM UNIT #B-82 WHICH IS RENTED BY THE COMPLAINANT, EDMON CAREY DOWELL. THE WITNESS CONTACTED THE COMPLAINANT TO COME TO THE STORAGE LOCATION. UPON ARRIVAL THE COMPLAINANT FOUND THAT TWO MAHOGANY WING BACK CHAIRS VALUED AT $400.00 EACH, ONE MAHOGANY HIGH BACK OFFICE CHAIR VALUED AT $150.00, AND A THREE PIECE SERVICE FOR EIGHT SET OF CRYSTAL STEM WARE VALUED AT $1,500.00 HAD BEEN REMOVED

> FROM HIS STORAGE BUILDING. THE COMPLAINANT TOLD AFFIANT THAT HE DID NOT GIVE THE DEFENDANTS PERMISSION TO ENTER HIS STORAGE BUILDING NOR DID HE GIVE PERMISSION TO THE DEFENDANTS TO TAKE HIS PROPERTY. THE VALUE OF THE PROPERTY TAKEN IS $2450.00. THE COMPLAINANT DESIRES PROSECUTION.

R. Vol. 1, p. 505 (Respondent's Dec. 1, 2000 Probable Cause Affidavit).

The District Attorney's Office "fills in the identifying information on the suspect at the top of the purported probable cause affidavit." *R. Vol. 2, p. 451 (Wilson's Dec. 7, 2004 Affidavit).* On the same page, immediately above the foregoing passage from the probable cause affidavit, the office apparently identified Petitioner's correct name prior to her marriage: "Kelli Renee Barrett"; Petitioner's correct race: "W"; Petitioner's correct gender: "F"; and Petitioner's correct "SPN": "01334688." *See R. Vol. 1, p. 505 (Respondent's Dec. 1, 2000 Probable Cause Affidavit).*[15] This identifying information was consistent with the information contained in the JIMS report. *R. Vol. 2, p. 451 (Wilson's Dec. 7, 2004 Affidavit).*

Respondent believes that after signing the probable cause affidavit, he delivered the documentation package to the District Attorney's office for further processing in accordance with his usual practice. *Id., p. 483.* Respondent

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[15] *See also R. Vol. 2, pp. 376-77* (Petitioner's Third Amended Complaint) (wherein Petitioner represents that "[o]n the same page but immediately above the foregoing narrative in his warrant application, Defendant Morrow included as identifying information the [Petitioner's] correct name (prior to her marriage): 'Kelli Renee Barrett'; [Petitioner's] correct race: 'W'; [Petitioner's] correct gender: 'F'; and [Petitioner's] correct 'SPN': '01346088' ").

testified that, at that point, his involvement in the process generally ended unless he was asked to testify in court. In this case, Respondent did not meet with the Magistrate, *R. Vol. 1, p. 516* (*Respondent's Nov. 4, 2004 Deposition*), and did not otherwise recall testifying in court as to any matter leading to Petitioner's arrest. *R. Vol. 2, p. 483* (*Respondent's Dec. 7, 2004 Affidavit*).

4. Petitioner's arrest and subsequent proceedings incident to and arising out of her arrest

Petitioner "Kelli Renee Barrett" was arrested pursuant to a warrant issued by a Harris County Magistrate charging her with felony theft, and was held in the Harris County jail between May 1 and May 2, 2001. *R. Vol. 2, p. 452* (*Wilson's Dec. 7, 2004 Affidavit*); *R. Vol. 2, p. 480* (*JIMS Booking Inquiry*).

Respondent did not know what information was used to prepare Petitioner's arrest warrant or how the arresting officer determined her current address prior to her arrest.[16] *R. Vol. 2, pp. 482-83* (*Respondent's Dec. 7, 2004 Affidavit*). Respondent had no involvement in the preparation or execution of the arrest warrant. *R. Vol. 2, p. 482* (*Respondent's Dec. 7, 2004 Affidavit*). Other personnel in

[16] Respondent understood that there was no "Kelli Renee Barrett" living at 11715 Clarkston in Katy, Texas, the address listed in the JIMS report, and that "Kelli Renee Barrett" was arrested at her home at 20716 Mustang Falls Ct., Katy, Texas. *R. Vol. 2, pp. 482-83* (*Respondent's Dec. 7, 2004 Affidavit*). *See also R. Vol. 2, p. 451* (*Wilson's Dec. 7, 2004 Affidavit*). ADA Wilson testified that where, as here, no address is contained in the probable cause affidavit, the warrant division of the Harris County Sheriff's Office typically conducts an independent investigation in an attempt to locate a current address for the suspect. *R. Vol. 2, pp. 450-51* (*Wilson's Dec. 7, 2004 Affidavit*).

the Harris County Sheriff's office prepared the arrest warrant and arrested Petitioner.[17] *R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit)*. After Petitioner's arrest, it was determined that she was not the same person as "Kelley Barrett" and was released. *See R. Vol. 2, p. 452 (Wilson's Dec. 7, 2004 Affidavit); R. Vol. 2, p. 485 (Respondent's Dec. 7, 2004 Affidavit)*. Thereafter, a court dismissed the criminal charge that had been lodged against Petitioner. *See R. Vol. 2, p. 377 (Petitioner's Third Amended Complaint)*.

Petitioner subsequently initiated proceedings to have her arrest records expunged, and on March 22, 2002, the presiding judge of the 189th Judicial District Court signed an Agreed Order of Expunction in No. 2001-33764; *Ex parte Kelli Renee Barrett* (in the 189th Judicial District Court of Harris County, Texas). *R. Vol. 2, pp. 432-36.* All records relating to Petitioner's prosecution for this offense were expunged and destroyed. *See R. Vol. 2, p. 452 (Wilson's Dec. 7, 2004 Affidavit); R. Vol. 2, p. 485 (Respondent's Dec. 7, 2004 Affidavit)*.

REASONS FOR DENYING THE PETITION

A. Petitioner failed to present with accuracy and clarity what is essential to ready and adequate understanding of the points requiring consideration in this civil rights lawsuit alleging a Fourth Amendment claim for wrongful arrest based on mistaken identity.

Respondent challenges and disputes a number of assertions in the petition. Respondent submits that the

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[17] Petitioner does not contend that Respondent personally arrested her. *R. Vol. 1, p. 589 n. 1.*

following assertions are not supported by the summary judgment evidence or are based upon speculation, hearsay or mischaracterizations of testimony or the Fifth Circuit's opinion:

1. "The basis for the Fifth Circuit's decision was that . . . Morrow was therefore entitled to qualified immunity as a result of the Fifth Circuit's prior statutory interpretation of the element of causation under § 1983, *regardless of whether it would have been clearly apparent to an objectively reasonable police officer that a Fourth Amendment violation was likely to result from his actions.*" *Petition, p. 3.*
2. "*In reliance on undisputed evidence in the record indicating that Morrow's conduct was "objectively unreasonable," Petitioner did not contest in either the District Court or on appeal whether a genuine issue of fact existed with respect to Morrow's 'malicious intent.'*" *Petition, p. 3 n. 7* (citing *Petitioner's App. A5 n. 2*).
3. "*The material facts involved in this case are that Morrow, when using a computer data base that contained identifying information on persons known to reside within Harris County, Texas, arbitrarily substituted Petitioner's maiden name ('Kelli Renee Barrett') in his application for an arrest warrant when he had no reason to believe that Petitioner was, and had substantial reason to believe Petitioner was not, another person named 'Kelly Barrett.'*" *Petition, p. 4.*
4. The assertions found in the balance of Petitioner's Statement of Facts, which consists of allegations made by Petitioner in her

Third Amended Complaint, rather than competent summary judgment proof. *See Petition, pp. 3-5.*

5. "Morrow in his motion for summary judgment successfully contended that his alleged *subjective* 'good faith,' both independently and in combination with the Magistrate's decision to issue the warrant for Petitioner's arrest, 'broke tne causal chain' and 'insulated' him from liability under § 1983." *Petition, p. 6.*

Respondent urges that certiorari should be denied because Petitioner failed to "present with accuracy . . . and clarity whatever is essential to ready and adequate understanding of the points requiring consideration . . . " SUP. CT. R. 14(4), 15(2).

B. This Court's review of the Fifth Circuit's "break in causation" doctrine could not affect the rights of the parties to this case because Petitioner abandoned review in the Fifth Circuit of the district court's grant of summary judgment in Respondent's favor and thus cannot resuscitate her claims against Respondent in this Court.

Respondent submits that certiorari should be denied because Petitioner essentially seeks an advisory opinion from this Court on a causation issue that could not possibly affect the ultimate outcome of this case. Petitioner abandoned Fifth Circuit review of the district court's grant of summary judgment in Respondent's favor and cannot resurrect her claims against Respondent in this Court.

In the district court, Petitioner failed to identify any specific facts in the summary judgment record which

allegedly demonstrated a genuine issue of material fact. *R. Vol. 1, pp. 505-98.* On appeal to the Fifth Circuit, Petitioner failed to raise and brief any claimed genuine issue of material fact. In the "summary of the argument" and "conclusion" sections of her Fifth Circuit brief, Petitioner contended that a reasonable jury could conclude that Respondent's "factual suppositions when applying for his arrest warrant were objectively unreasonable under the circumstances." *Petitioner's Fifth Circuit Brief, pp. 5-6 (Summary of the Argument) & 32-33 (Conclusion).* In the "statement of facts" section of her Fifth Circuit brief, Petitioner included the same allegations later folded into in that same section of her pending Petition for Writ of Certiorari. *Petitioner's Fifth Circuit Brief, pp. 3-4. Compare Petition, pp. 4-5.* Petitioner failed to raise or brief these contentions in the "argument" section of her Fifth Circuit brief and concomitantly failed to provide any citations to the record or to supporting authority for these contentions. *See generally Petitioner's Fifth Circuit Brief, pp. 6-32.*

Where, as here, a party inadequately briefs a contention on appeal, that party is considered to have abandoned the contention on appeal. FED. R. APP. P. 28(a)(9). *E.g., Green v. State Bar of Tex.*, 27 F.3d 1083, 1089 (5th Cir. 1994) (finding that appellant abandoned claim by solely raising it in his summary of the argument section of his brief); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (finding that appellant abandoned arguments by failing to argue them in the body of his brief).

Even if Petitioner had adequately preserved these contentions for the Fifth Circuit's review, such contentions were conclusory and unsupported by record evidence and

supporting authority, and thus did not overcome Respondent's right to summary judgment. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) ("[C]onclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden."); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994) (en banc) (A nonmoving party's burden, when faced with a motion for summary judgment, "is not satisfied with 'some metaphysical doubt as to the material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence.").

On appeal to the Fifth Circuit, Petitioner failed to identify *any* factual dispute and record evidence which allegedly raised a genuine issue of material fact for trial. *See Petitioner's Fifth Circuit Brief, pp. 6-32.* Petitioner offered no summary judgment evidence disclosing that Respondent's conduct, in attempting to ascertain the true identity of the second suspect named in investigating officer Shinneman's offense report and in swearing out a probable cause affidavit against "Kelli Renee Barrett," was objectively unreasonable in light of law clearly established law.[18] Petitioner offered no evidence demonstrating that, given the totality of circumstances surrounding Respondent's probable cause determination, a reasonable officer in Respondent's position would have understood that his actions in executing the probable cause affidavit arguably

[18] *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost." *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986).

violated Petitioner's constitutional rights.[19] Petitioner offered no evidence showing that no reasonable officer *could* have believed that probable cause existed to seek an arrest warrant for "Kelli Renee Barrett" when Respondent swore out the probable cause affidavit at issue on December 1, 2000.[20] Petitioner offered no evidence revealing that Respondent reached anything other than reasonable, but mistaken, conclusions as to the facts establishing the

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[19] *Mendenhall v. Riser*, 213 F.3d 226, 230-31 (5th Cir. 2000) (*citing Illinois v. Gates*, 462 U.S. 213 (1983)), *cert. denied*, 531 U.S. 1071 (2001).

[20] A court asks "whether the [officer] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). "[E]ven if officers of reasonable competence could disagree," an officer would still be entitled to qualified immunity. *Tarver v. City of Edna*, 410 F.3d 745, 750 (5th Cir. 2005). In the instant case, ADA Ted Wilson proffered uncontroverted testimony establishing that Respondent followed proper procedures in identifying the suspect, acted reasonably in preparing documents upon which the arrest warrant was based, and did not intentionally or maliciously misstate any facts in the probable cause affidavit: "As part of my duties at the District Attorney's Office I also teach new cadets at the Harris County Sheriff's Academy concerning procedures and what is required and how to go about preparing probable cause affidavit when criminal charges are being considered. I have reviewed the portions of the purported offense report filed by Deputy Shinneman available in this case, the portions of the purported probable cause affidavit allegedly signed by Deputy Morrow, the JIMS printout relating to Kelli Barrett and I have talked with Deputy Morrow concerning his actions in this case. Based on my experience and what is taught to Harris County Sheriff's Deputies and the procedures that they are expected to follow, it is my opinion that Deputy Morrow followed proper procedure and that he acted in good faith in the preparation of the documents which were the basis for the arrest warrant. It is my further opinion that Deputy Morrow acted reasonably and did not intentionally or maliciously misstate any facts in the probable cause affidavit." *R. Vol. 2, p. 450* (*Wilson's Dec. 7, 2004 Affidavit*).

existence of probable cause for the arrest of "Kelli Renee Barrett."[21] In sum, Petitioner failed to raise and brief any genuine issue of material fact as to whether Respondent's conduct in executing the probable cause affidavit was objectively unreasonable.[22]

Under these circumstances, the Fifth Circuit found that Petitioner abandoned review of the district court's grant of summary judgment in Respondent's favor:

> We do not consider Fitch's concise and conclusory statement in her brief regarding summary judgment because she did not reference specific facts in the summary judgment record which demonstrate a genuine issue of material fact. She does not discuss the summary judgment issue in the

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[21] According to this Court: "[o]fficers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* [*v. Creighton*] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions." *Saucier v. Katz*, 533 U.S. 194, 205-06 (2001).

[22] It must be noted that Respondent was also entitled to qualified immunity because of "extraordinary circumstances." An officer who is so prevented from knowing that his actions were unconstitutional is not imputed with knowledge of a clearly established right. *V-1 Oil Co. v. State of Wyo., Dept. of Envtl. Quality*, 902 F.2d 1482, 1488 (10th Cir.), *cert. denied*, 498 U.S. 920 (1990). The circumstance most often considered as "extraordinary" is reliance on the advice of counsel. *V-1 Oil*, 902 F.2d at 1488. The undisputed evidence shows that when participating in the preparation of the probable cause affidavit at issue here, Respondent sought and relied upon the advice given to him by counsel in the Harris County District Attorney's Office. *E.g., R. Vol. 1, pp. 518, 521, 529 (Respondent's Nov. 4, 2004 Deposition); R. Vol. 2, p. 483 (Respondent's Dec. 7, 2004 Affidavit). See also R. Vol. 2, pp. 450-51, 453-54 (Wilson's Dec. 7, 2004 Affidavit).*

> body of her argument nor does she offer evidence to support a finding that summary judgment was improperly granted. Because she has failed to adequately raise or brief any claimed genuine issue of material fact, she has essentially abandoned this issue on appeal and waived this panel's review of the district court's grant of summary judgment in favor of Morrow.

Petitioner's App. A5-A6 n. 2 (citing FED. R. APP. P. 28(a)(9)).

Given Petitioner's failure to raise or brief any asserted genuine issue of material fact in the Fifth Circuit, her petition for certiorari should be denied. A federal court "has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Prieser*, 422 U.S. at 401. This Court's "judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Id.*

C. This Court's review of the Fifth Circuit's "break in causation" doctrine could not affect the rights of the parties to this case because this doctrine was well established Fifth Circuit law when Petitioner's cause of action allegedly arose.

Relying on dicta in *Malley v. Briggs*,[23] Petitioner asks this Court to overrule Fifth Circuit case law holding that

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[23] *See Malley*, 475 U.S. at 345 n. 7. *But see id.* at 346, n. 9; *Id.* at 350-54 (*Powell & Rehnquist, JJ., concurring & dissenting*).

once facts supporting an arrest are placed before a magistrate or other independent intermediary, the intermediary's decision "breaks the chain of causation" unless the plaintiff affirmatively shows that the deliberations of that intermediary were in some way tainted by the actions of the defendant.[24] When analyzing Respondent's qualified immunity claim, the objective reasonableness of Respondent's conduct is reviewed in light of law that was clearly established at the time he swore out the probable cause affidavit. Since the Fifth Circuit's "break in causation" doctrine was well established Fifth Circuit law when Petitioner's cause of action allegedly arose, this Court's review of this superseding causation principle could not affect the rights of the parties to this case and certiorari should be denied.

Government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine protects "all but the plainly incompetent or those who knowingly violate the

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[24] Under this superseding causation principle, once "facts supporting an arrest are placed before an independent intermediary such as a magistrate or grand jury, the intermediary's decision breaks the chain of causation for false arrest, insulating the initiating party" unless the plaintiff "affirmatively shows that 'the deliberations of that intermediary were in some way tainted by the actions of the defendants.' " This "firmly ensconced circuit precedent" remains governing law in the Fifth Circuit. *Murray v. Earle*, 405 F.3d 278, 292, 290-93 (5th Cir.), *cert. denied*, 126 S.Ct. 749 (2005); *Shields v. Twiss*, 389 F.3d 142, 150 (5th Cir. 2004); *Taylor v. Gregg*, 36 F.3d 453, 456 (5th Cir. 1996); *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988); *Garris v. Rowland*, 678 F.2d 1264 (5th Cir. 1982); *Smith v. Gonzales*, 670 F.2d 522 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982).

law." *Malley*, 475 U.S. at 341; *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 284 (5th Cir. 2002).

When ruling on the qualified immunity issue, a court first decides this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

Whether a defendant asserting qualified immunity may be personally liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law. To satisfy this second requirement, a plaintiff must demonstrate that: (1) the right was clearly established when the violation occurred; and (2) the official's conduct was objectively unreasonable in the light of that clearly established law. For a law to be "clearly established," it "is not enough" that a "broad general proposition" is well established. *Saucier*, 533 U.S. at 201-02. Instead, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202 (quoting *Anderson*, 483 U.S. at 640). According to this Court: "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

The objective reasonableness of allegedly illegal conduct is assessed in light of the rules clearly established at the time it was taken. *Anderson*, 483 U.S. at 639; *Harlow*, 457 U.S. at 818. A defendant's acts "are held to be

objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have *then* known that the defendant's conduct violated the plaintiff's asserted constitutional or federal statutory right." *Cozzo*, 279 F.3d at 284. The Fifth Circuit's "break in causation" doctrine was clearly established law in 2000, when Respondent signed and a magistrate reviewed the probable cause affidavit at issue in this case, and was properly applied to the facts of this case. *Petitioner's App. A5-A7.* Certiorari should be denied because Petitioner asks this Court to decide a question that cannot affect the rights of the parties or the outcome of this appeal. *See Prieser*, 422 U.S. at 401.

CONCLUSION

For these reasons, Respondent asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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